INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING THE AERIAL INCIDENT OF 3 JULY 1988

(ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA)

VOLUME II

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DE L'INCIDENT AÉRIEN DU 3 JUILLET 1988

(RÉPUBLIQUE ISLAMIQUE D'IRAN *c.* ÉTATS-UNIS D'AMÉRIQUE)

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The pleadings in the case are being published in the following order:

Volume I. Application instituting proceedings of the Islamic Republic of Iran; Memorial of the Islamic Republic of Iran.

Volume II. Preliminary objections of the United States of America; Observations and submissions of the Islamic Republic of Iran on the preliminary objections; Observations of the International Civil Aviation Organization; selection of correspondence; Settlement Agreement.

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PRELIMINARY OBJECTIONS SUBMITTED BY THE UNITED STATES OF AMERICA

EXCEPTIONS PRÉLIMINAIRES PRÉSENTÉES PAR LES ÉTATS-UNIS D'AMÉRIQUE

INTRODUCTION AND SUMMARY

On 17 May 1989, the Government of Iran filed an Application with this Court instituting the present case against the United States. Iran stated that "[t]his dispute arises from the destruction of an Iranian aircraft, Iran Air Airbus A-300B, flight 655 and the killing of its 290 passengers and crew by two surface-to-air missiles launched from the U.S.S. Vincennes, a guided-missile cruiser on duty with the United States Persian Gulf/Middle East Force in the Iranian airspace over the Islamic Republic's territorial waters in the Persian Gulf on 3 July 1988." This incident occurred in the midst of an armed engagement between U.S. and Iranian forces, in the context of a long series of attacks on U.S. and other vessels in the Gulf.

In its Application, the Government of Iran sought relief from this Court on the basis of Article 84 of the Convention on International Civil Aviation of 1944 (hereinafter the "Chicago Convention") and Article 14 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 (hereinafter the "Montreal Convention").

On 12 June 1990, the Court ordered that the Government of Iran file its Memorial by 24 July 1990, and that the United States file its Counter-Memorial by 4 March 1991. In accordance with this Order and with the Court's Order of 13 December 1989, the United States submits the following preliminary objections to the jurisdiction of the Court to entertain the claims filed by Iran.

In this case, Iran is, under Article 36(1) of the Statute of the Court, invoking three titles of jurisdiction provided for in conventions to which the United States and Iran are party. They are Article 84 of the Chicago Convention, Article 14(1) of the Montreal Convention, and Article XXI(2) of the 1955 Treaty of Amity between Iran and the United States (hereinafter the "Treaty of Amity"). Each of these provisions confers on the Court jurisdiction to decide disputes relating to the interpretation and application of the subject convention once certain conditions are satisfied. It is the contention of the United States that in no case are the applicable conditions satisfied and that the Court has no jurisdiction under any of these conventions. The United States accordingly is requesting that the Court address the issue of jurisdiction first, in accordance with Article 79 of the Rules of the Court.

In its Application, Iran invoked Article 84 of the Chicago Convention, "in order to appeal from the decision rendered on 17 March 1989 by the Council of the International Civil Aviation Organization"; and Article 14 of the Montreal

Convention. Fourteen months later, in its Memorial, Iran invoked for the first time Article XXI of the Treaty of Amity. None of these conventions, placed in the context of the facts of this case, provides a basis for the jurisdiction of this Court as alleged by Iran.

With respect to the Chicago Convention, the International Civil Aviation Organization (hereinafter "ICAO") Resolution of 17 March 1989 was not a "decision" of the ICAO Council within the meaning of Article 84 of the Chicago Convention. Iran never asked for a decision of the Council under Article 84 and the Council never rendered a decision under that Article. The proceedings that led to the ICAO Resolution, as well as the form and substance of the Resolution itself, clearly show that the Council was not acting under Article 84 when it adopted its Resolution, but rather under an entirely separate procedure from which there is no appeal to the Court. Iran's attempt to by-pass the established ICAO procedures for resolution of disputes threatens the institutional integrity and effective operation of ICAO.

The Montreal Convention also provides no basis for the Court's jurisdiction. Iran has failed to satisfy the prerequisites for the Court's jurisdiction under the Montreal Convention by not having sought to resolve this dispute through negotiations prior to filing suit in the Court, and by failing to comply with the Convention's clear requirements for the prior exhaustion of arbitration procedures. Furthermore, Iran's claim has absolutely no connection to the Montreal Convention and is clearly outside its scope. The terms and history of that Convention, as well as the subsequent practice of the parties, make clear that it does not apply to acts of States against civil aircraft -- particularly acts committed by the armed forces of States. The actions of the United States upon which Iran relies to sustain its claim are governed by the laws of armed conflict and not the Montreal Convention.

With respect to the Treaty of Amity, Iran is asserting this Treaty in bad faith, given Iran's past inconsistent assertions and conduct under the Treaty. The United States contends that the Court does not have jurisdiction because Iran failed to assert this Treaty as a basis of jurisdiction in its Application and is now seeking to transform the dispute as set forth in its Application into another dispute which is wholly different in character. Further, the Treaty of Amity has no connection to the dispute that is the subject of Iran's Application. Finally, Iran may not invoke the compromissory clause of the Treaty of Amity because Iran has made no effort to resolve that dispute by diplomacy, as is required by the

Treaty of Amity. Nor has Iran pursued the United States' efforts to make compensation for the incident.

In its Memorial, Iran also asserted that the United States has violated the United Nations Charter and various other conventions and principles of international law. The Court must disregard these allegations, since the Court has jurisdiction over none of them.

In effect, Iran has deliberately avoided normal diplomatic practice and disregarded the procedures for resolution of disputes provided in the conventions it cites. Iran has instead brought to this Court questions over which the Court has no jurisdiction, and for which there is no adequate record nor reasonable basis for judicial resolution. After trying and failing to obtain condemnation of the United States in ICAO under procedures which do not contemplate further review, Iran has -- after the fact -- wholly recast the nature of its complaint in an attempt to recoup its fortunes in this Court. As a result of Iran's actions, the United States has been unable to proceed with the payment of compensation to the Iranian families of the victims of this tragic incident. The Court has the authority under Article 79 of the Rules of the Court to act on these preliminary objections; it is submitted that the Court should do so by rejecting Iran's improper invocation of the Court's jurisdiction.

The United States reserves its right to object to any other issue of the Court's jurisdiction over, or the admissibility of, Iran's claims that arise in the course of these proceedings, as well as the right under Article 80 of the Rules of the Court to present counter-claims in the event the Court determines that it has jurisdiction in this matter.

PART I

STATEMENT OF FACTS RELEVANT TO JURISDICTION

The Application and Memorial filed by Iran in this case are based on an incident that occurred on 3 July 1988, in the Gulf near the coast of Iran involving Iranian gunboats, U.S. naval vessels, and Iran Air Flight 655. In considering the jurisdiction of this Court, many of the factual assertions made by Iran need not be addressed at this time by the Court. It is, however, important for the Court to appreciate that this incident occurred in the midst of an armed engagement between U.S. and Iranian forces, in the context of a long series of attacks on U.S. and other vessels in the Gulf. The incident of Iran Air Flight 655 cannot be separated from the events that preceded it and from the hostile environment that existed on 3 July 1988, due to the actions of Iran's own military and paramilitary forces. The report of investigation of the International Civil Aviation Organization (hereinafter "ICAO") found that:

> "As a result of difficulties experienced by international shipping in the Gulf, naval forces of several States entered the area to provide a protective presence and safeguard the freedom of navigation. The extent and intensity of hostile activities varied considerably from time to time. The incident on 17 May 1987 in which the USS Stark was severely damaged by two air-launched Exocet missiles was of particular relevance in the chain of events leading to the destruction of flight IR655[1]."

---

[1] "Destruction of Iran Air Airbus A300 in the Vicinity of Qeshm Island, Islamic Republic of Iran on 3 July 1988: Report of ICAO Fact-Finding Investigation, November 1988", ICAO Doc. C-WP/8708, restricted, Appendix, para. 2.1.1 (Exhibit 9) (hereinafter referred to as "ICAO Report").

For more than four years prior to 3 July 1988, Iran had repeatedly attacked merchant shipping in the Gulf as a part of its conduct of the Iran-Iraq war, which had been actively waged since September 1980. Several U.S. merchant ships, as well as several hundred merchant ships from other States, were attacked and damaged by Iranian naval vessels, aircraft, mines, and missiles during this period. These ships, which were on the high seas travelling to and from non-Iraqi ports, were almost never stopped and searched by Iran to determine whether they were trading with Iraq or carrying contraband destined for Iraq.

On 3 July 1988, U.S. naval vessels, after seeking to assist a merchant vessel, found themselves forced to take action in self-defense as a result of an unprovoked attack by Iranian gunboats. In the midst of this surface engagement, an unidentified aircraft departed from the Iranian joint military/civilian airfield complex near Bandar Abbas and set a course which would take it directly over the USS Vincennes. The Commanding Officer of the USS Vincennes was aware that Iran recently had moved sophisticated, high performance Iranian F-14 fighter aircraft to the airfield at Bandar Abbas; indeed, Iran had recently operated these fighter aircraft from Bandar Abbas on several occasions in the vicinity of the incident of 3 July 1988. On that date, the rapidly approaching unidentified aircraft failed to respond to repeated warnings and directions to turn away which were broadcast on both military and civilian air distress frequencies. Instead, the aircraft continued to close to within ten nautical miles of the ship (well within the range of the Maverick missiles that had been employed by the Iranian Air Force to attack shipping in this area). At this point, the Commanding Officer of the USS Vincennes determined that he could no longer withhold his fire and still adequately ensure the defense of his ship against the approaching aircraft. Consequently, and as a matter of necessity, he responded by firing two missiles that downed the aircraft less than eight nautical miles from the U.S. naval vessels. The subsequent ICAO Investigation Report concluded in paragraph 3.2.1 that "[t]he aircraft was perceived as a military aircraft with hostile intentions and was destroyed by two surface-to-air missiles."

Only afterwards did it become clear that the approaching aircraft was a civilian airliner, which Iranian authorities had permitted to take off and fly directly towards the U.S. vessels while they were involved in a surface engagement with Iranian gunboats. The United States immediately expressed its deep regret over the incident and cooperated fully with the team established by the ICAO Council to investigate the circumstances of the incident. Before the United Nations

Security Council and the ICAO Council and in communications to each State having nationals aboard the flight (including Iran), the United States offered to pay compensation to the families of the victims. While some families of the victims initially chose to pursue legal remedies in U.S. courts, in due course this compensation offer was accepted by many of the families and payments were made. Of the States involved, only Iran has rejected the U.S. offer and has prevented its nationals from accepting payment.

All these events are important in understanding why U.S. naval vessels came to be off the coast of Iran in 1988; why on 3 July of that year the USS Vincennes feared an imminent attack from Iranian aircraft and reacted accordingly; how the United States thereafter worked on its own and within the United Nations and ICAO, the competent specialized agency, to understand why this incident occurred; and how the United States made efforts to provide compensation for the incident.

CHAPTER I

IRANIAN ATTACKS ON MERCHANT SHIPPING DURING THE IRAN-IRAQ WAR THREATENED THE FREEDOM OF NAVIGATION AND PROMPTED THE DEPLOYMENT OF MILITARY FORCES BY VARIOUS NATIONS TO THE GULF.

It is well known that in late 1980, armed hostilities broke out between Iran and Iraq, leading to extensive fighting between those two countries for eight years. The war between Iran and Iraq extended into the Gulf in March of 1984 when Iraq initiated attacks on tankers using Iran's oil terminal at Kharg Island. Lacking comparable Iraqi targets which could be easily attacked, Iran chose to retaliate by attacking on the high seas ships calling at non-Iraqi Arab ports in the Gulf. These Iranian attacks on merchant vessels in the Gulf became extensive in 1987 and continued until the incident of 3 July 1988 and thereafter. The United States submits as Annex 1 to this pleading a description of many of the incidents of unprovoked Iranian attacks on merchant vessels during 1987-88.

The major thrust of U.S. policy in the region during the Iran-Iraq War was to seek a peaceful settlement of the conflict, largely through the U.N. Security Council[1]. In the interim, however, the United States undertook appropriate steps to protect its interests and those of other friendly States, especially because of an Iranian threat to close the Strait of Hormuz and the likelihood that U.S. ships might be attacked in the Gulf[1].

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[1] During the Gulf war, the U.N. Security Council passed six resolutions calling upon Iran and Iraq to cease their military operations. Res. 479, U.N. Sec. Council (2248th meeting, 28 Sep. 1980), reprinted in U.N. Doc. S/INF/36, p. 23; Res. 514, U.N. Sec. Council (2383rd meeting, 12 July 1982), U.N. Doc. S/RES/514; Res. 522, U.N. Sec. Council (2399th meeting, 4 Oct. 1982), U.N. Doc. S/RES/522; Res. 540, U.N. Sec. Council (2493rd meeting, 31 Oct. 1983), U.N. Doc. S/RES/540; Res. 552, U.N. Sec. Council (2546th meeting, 1 June 1984), U.N. Doc. S/RES/552; Res. 582, U.N. Sec. Council (2666th meeting, 24 Feb. 1986), U.N. Doc. S/RES/582; Res. 588, U.N. Sec. Council (2713th meeting, 8 Oct. 1986), reprinted in U.N. Doc. S/INF/42, p. 13; Res. 598, U.N. Sec. Council (2750th meeting, 20 July 1987), U.N. Doc. S/RES/598. These resolutions are Exhibit 31.

Pursuant to a letter by the Governments of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates complaining of Iranian attacks on commercial ships en route to and from Kuwait and Saudi Arabia, the Security Council condemned those attacks, demanded that they cease, and requested that the Secretary-General report on the progress of the implementation of Resolution 552. Exhibit 31, Res. 552.

Attached as Exhibit 32 is the Report plus addenda of the Secretary General in pursuance to Resolution 552, which recount the dates of incidents, the name, type and nationality of the vessels attacked, and information on the location and type of attack. Report of the Secretary-General in Pursuance of Security Council Resolution 552 (31 Dec. 1984), United Nations Doc. S/16877; Add. 1, 22 Jan. 1985; Add. 2, 31 Dec. 1985; Add. 3, 31 Dec. 1986; Add. 4, 22 Jan. 1987; Add. 3, Corr. 1, 10 Feb. 1987; and Add. 5, 31 Dec. 1987.

In particular, the United States deployed warships to the Gulf to help protect merchant ships flying U.S. and other flags that were not engaged in carrying contraband for either of the two belligerents. Many other States also deployed warships to the Gulf for this purpose, including the United Kingdom, France, the Netherlands, Italy, Belgium, and the USSR[2].

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[1] *See* "U.S. Policy in the Persian Gulf", Special Report No. 166, U.S. Dep't of State, pp. 3-4 (July 1987), Exhibit 36; *see also* P. DeForth, "U.S. Naval Presence in the Persian Gulf: The Mideast Force Since World War II", *Naval War College Review*, p. 28 (Summer 1975), Exhibit 37.

[2] *See* "Iran Fires Missile at Kuwait", *Washington Post*, 5 Sep. 1987, p. A-1 (hereinafter "*Wash. Post*"); "Dutch Sending 2 Ships to Hunt Mines in Gulf", *New York Times*, 8 Sep. 1987, p. A-3 (hereinafter "*N.Y. Times*"); "Perez de Cuellar's Gulf Trip Ends in Apparent Failure", *Wash. Post*, 16 Sep. 1987, p. A-1; "Reagan Accepts Plan to Escort Tankers", *Wash. Post*, 30 May 1987, p. A-1; "Baker Hints at U.S. Action if Iran Deploys Gulf Missiles", *N.Y. Times*, 8 June 1987, p. A-8; "U.S. Policy in the Persian Gulf," *op. cit.*, Exhibit 36, pp. 5-7. In April 1987, Kuwait signed an agreement with the Soviet Union to lease Soviet tankers to Kuwait; by May 1987 the first of three Soviet ships leased to Kuwait began operating in the Gulf, with a Soviet frigate and two minesweepers as escorts. "Iraqi Missile Hits U.S. Navy Frigate in Persian Gulf", *N.Y. Times*, 18 May 1987, p. A-1; "Preemptive U.S. Strike on Iran Missiles Debated", *Wash. Post*, 5 June 1987, p. A-1. For copies of all newspaper articles referred to in this Part, see Exhibit 35.

Many of Iran's indiscriminate attacks on merchant vessels were conducted by small gunboats of Boghammar manufacture. These gunboats were typically equipped with machine guns, rocket launchers (including rocket-propelled grenades), and small arms[1]. U.S.-owned vessels were among those attacked by Iranian gunboats. For example, on 9 July 1987, an Iranian gunboat attacked the U.S.-owned Liberian-flagged tanker *Peconic* off Kuwait, while on 6 November 1987, Iranian gunboats attacked the U.S.-owned Panamanian-flagged *Grand Wisdom*[2]. On 16 November 1987, Iranian gunboats attacked the U.S.-owned, Bahamian-flagged *Esso Freeport* and attacked the U.S.-owned Liberian-flagged *Lucy* near the Strait of Hormuz[3].

U.S. military forces took an active role in responding to requests for help from U.S. vessels and from other vessels in distress when attacked by Iranian military and paramilitary gunboats. On 12 December 1987, a helicopter from the destroyer

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[1] ICAO Report, para. 1.16.1.2.

[2] Exhibit 32, S/16877/Add.5, pp.8, 14.

[3] "Gunboats Attack U.S. Tanker", *Foreign Broadcast Information Service*, 16 Nov. 1987, p. 23 (hereinafter "*FBIS*"); "Lloyds Reports Liberian Tanker Attacked by Iran", *FBIS*, 17 Nov. 1987, p. 20; Exhibit 32, S/16877/Add. 5, p. 15.

USS *Chandler* rescued 11 seamen from the burning Cypriot-flagged tanker, the *Pivot*, off Dubai following an attack by an Iranian frigate[1]. On 25 December 1987, a U.S. Navy helicopter rescued 11 seamen and a British Navy helicopter rescued nine seamen from a burning South Korean freighter, the *Hyundai-7*, after it had been attacked by Iranian small boats 25 miles north of Sharjah[2].

This assistance sometimes brought U.S. military forces into hostile contact with the Iranian gunboats, which would attack the U.S. forces. For instance, on 8 October 1987, three Iranian gunboats about 15 miles southwest of Farsi Island fired upon U.S. helicopters. Three U.S. helicopters returned fire, sinking all three of the Iranian boats[3]. Several other nations also were forced to take steps to protect their shipping.

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[1] "U.S. Navy Rescues Tanker Crew in Gulf", *N.Y. Times*, 13 Dec. 1987, p. L-3; Exhibit 32, S/16877/Add.5, p.17.

[2] "Lloyds Cited on Attack on S. Korean Ship", *FBIS*, 28 Dec. 1987, p. 27; Exhibit 32, S/16877/Add.5, p.18.

[3] Letter dated 9 Oct. 1987 from the Permanent Representative of the U.S. to the U.N. Addressed to the President of the Security Council, U.N. Doc. S/19194 (Exhibit 33); Letter dated 10 Oct. 1987 from President Reagan to the President Pro Tempore of the Senate and the Speaker of the House, Weekly Compil. of Pres. Docs., p. 1159 (1987) (Exhibit 33); "U.S. Helicopters Sink 3 Iranian Gunboats in Persian Gulf", *Wash. Post*, 9 Oct. 1987, p. A-1; "U.S. Gulf Forces Said to Seek More Powers", *Wash. Post*, 13 Oct. 1987, p. A-1.

In addition to gunboats, Iran used naval mines, missiles and aircraft to attack shipping in the Gulf. On 24 July 1987, the S.S. *Bridgeton*, a U.S.-reflagged Kuwaiti tanker under U.S. military escort into the Gulf, hit a mine about 18 miles west of the Iranian island of Farsi, causing extensive damage to the ship[1]. Consequently, the United States ordered U.S. Navy minesweeping helicopters to the Gulf[2]. Other nations dispatched minesweeping units as well[3]. At times Iran denied that it was the source of these mines. Nevertheless, in a Tehran radio dispatch on 20 August 1987, Iran admitted that it had mined the Persian Gulf, purportedly to "protect" its coastline[1].

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[1] "After the Blast, Journey Continues", *N.Y. Times*, 25 July 1987, p. 5; Exhibit 32, S/16877/Add.5, p.9.

[2] "U.S. Acts to Bolster Gulf Mine Defenses on Several Fronts", *Wall Street Journal*, 4 Aug. 1987, p. 1 (hereinafter *Wall St. Journal*"); "8 U.S. Helicopters Arrive for Mission to Sweep the Gulf", *N.Y. Times*, 17 Aug. 1987, p. A-1; "U.S. Orders 8 Old Minesweepers to the Gulf", *N.Y. Times*, 20 Aug. 1987, p. A-1.

[3] See Annex 1.

Iran constructed missile sites and launched Silkworm missiles primarily from the Faw Peninsula in 1987, damaging Kuwaiti shipping facilities and merchant ships off Kuwait, including the U.S.-flagged tanker _Sea Isle City_[2]. Iran also inflicted considerable damage on shipping in the Gulf with attacks by Iranian aircraft, usually fighter aircraft using Maverick missiles and "iron" or gravity bombs[3]. On 2 February 1988, five months before the incident of 3 July 1988, two Iranian F-4s launched two Maverick missiles at the Liberian tanker _Petrobulk Pilot_ about 30 nautical miles south-southwest of the area where the incident of 3 July 1988 took place[1]. A few days later, on 12 February 1988, an Iranian helicopter attacked the Danish vessel Karama Maersk.

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[1] "Iran Says it Mines the Gulf", _Wash. Post_, 21 Aug. 1987, p. A-1.

[2] _See_ Annex 1.

[3] Maverick missiles can be launched from ranges of 0.5 to 13 nautical miles and are television guided. The launching aircraft must be able to keep visual track of the target, but does not have to scan the target with radar. "Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on 3 July 1988" (hereinafter "ICAO Report, Appendix E"), p. E-12.

This state of tension and conflict continued through the spring and into the summer of 1988. On 14 April 1988, the USS Samuel B. Roberts was struck by naval mines laid by Iranian gunboats in shipping channels, east of Bahrain, causing extensive damage to the vessel and injuring ten crewmen, some seriously[2]. In response to this unlawful use of force and as a proportionate measure to deter further Iranian attacks on merchant vessels, on 18 April 1988, United States military forces used force to inflict damage upon oil platforms where Iranian military command and control facilities were located and from which Iranian gunboats were deployed to attack shipping and to lay naval mines. Before doing so, the United States directed the evacuation of personnel on the platforms. In retaliation, Iranian fighter aircraft were deployed from the airport near Bandar Abbas (the same airport from which Iran Air Flight 655 would depart) to join Iranian frigates and small boats from Abu Musa Island and Qeshm Island in attacks on U.S.-owned or associated oil rigs, platforms and jack-up rigs. During the engagement with U.S. forces protecting these rigs and platforms, two Iranian frigates and one missile patrol boat were sunk or severely damaged. One of the Iranian F-4s that scrambled from Bandar Abbas during this incident failed to respond to repeated U.S. warnings; when it continued to close on U.S. vessels, the USS *Wainwright* launched missiles, damaging the aircraft. Much of this activity took place just to the south of the area where the incident of 3 July 1988 occurred[1].

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[1] "Iran Tries Aerial Attack on Cargo Ship in Gulf", Christian Science Monitor, 3 Feb. 1988, p. 2. Military forces in the Gulf knew that Iranian F-14s could be configured to drop iron-bombs on naval vessels if they could approach within two nautical miles of the target. ICAO Report, Appendix E, p. E-12.

[2] "Blast Damages U.S. Frigate in Gulf", N.Y. Times, 15 Apr. 1988, A-21. The mine exploded on the port side of the keel by the engine room, opening a hole 30 by 23 feet. Extensive damage occurred from the explosion and subsequent fire and flooding. R. O'Rourke, "Gulf Ops," Naval Review Proceedings, p. 44 (1989) (Exhibit 38). Several mines were subsequently found in the Central Gulf. "U.S. Finds 2 Mines Where Ship was Damaged", N.Y. Times, 16 Apr. 1988, p. 32; "U.S. Warship Damaged by Gulf Blast", Wash. Post, 15 Apr. 1988, p. A-21.

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[1] Letter dated 18 Apr. 1988 from the Acting Permanent Representative of the U.S. to the U.N. Addressed to the President of the Security Council, U.N. Doc. S/19791 (Exhibit 34); ICAO Report, Appendix E, pp. E-11 - E-12; *Wash. Post*, 23 Apr. 1988.

In the month preceding the incident of 3 July 1988, Iranian F-14s were transferred to Bandar Abbas, which was perceived by the United States as a significant upgrade in Iranian offensive air capability at that airport[1]. In the three-day period prior to the incident, there was heightened air and naval activity in the Gulf, including over-water flights by Iranian F-14s in the vicinity of U.S. naval vessels. U.S. forces in the Gulf were alerted to the probability of significant Iranian military activity against merchant shipping or U.S. military vessels in retaliation for recent Iraqi military successes in the land war; it was expected that such retaliation could come over the weekend of 4 July, the day the United States celebrates its independence.

On 2 July and into 3 July 1988, Iranian small boats positioned themselves at the western approaches to the Strait of Hormuz from which they routinely challenged and indiscriminately attacked merchant vessels[2]. On 2 July 1988, the Danish vessel Karama Maersk, outbound from Saudi Arabia, was repeatedly attacked by Iranian small boats. The Karama Maersk issued a "mayday" distress call requesting assistance. The USS Elmer Montgomery responded and observed several Iranian small boats to fire rockets at the Danish ship. When the USS Elmer Montgomery fired a warning shot at the small boats, the Iranian boats retired[1].

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[1] ICAO Report, Appendix E, pp. E-6, E-13.

[2] ICAO Report, Appendix E, pp. E-6, E-7.

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[1] ICAO Report, Appendix E, p. E-7; "U.S. Warship Fires Warning at Iranian Boat", Wash. Post, 3 July 1988, p. A-25.

CHAPTER II

ON 3 JULY 1988, IRANIAN GUNBOATS AND U.S. NAVAL VESSELS WERE ENGAGED IN COMBAT WHEN AN UNIDENTIFIED IRANIAN AIRCRAFT RAPIDLY APPROACHED THE U.S. VESSELS AND, UPON FAILURE TO RESPOND TO REPEATED RADIO WARNINGS, WAS SHOT DOWN.

On 3 July 1988, the USS *Elmer Montgomery* was on patrol in the northern portion of the Strait of Hormuz outside the territorial waters of Iran[1]. At approximately 3 UTC, the USS *Elmer Montgomery* detected seven small Iranian gunboats with manned machine gun mounts and rocket launchers approaching a Pakistani merchant vessel. Shortly thereafter, the USS *Elmer Montgomery* detected a total of 13 Iranian gunboats breaking into three groups, one of which took a position off the USS *Elmer Montgomery*'s port quarter. The USS *Elmer Montgomery*

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[1] All U.S. naval vessels prior to the engagement with Iranian small boats were in international, not Iranian waters. The ICAO investigation determined that at 6:10 a.m. the position of the three U.S. ships was as follows:

USS *Vincennes*	26 26 N, 056 02 E
USS *Elmer Montgomery*	5 nautical miles northwest of the USS *Vincennes*
USS *Sides*	18 nautical miles northeast of the USS *Vincennes*

See ICAO Report, Appendix A, p. A-1. These positions are all outside of Iranian territorial waters.

could hear the gunboats over communications channels challenging merchant ships in the area and shortly thereafter heard explosions to the north[1].

The USS Vincennes was directed to proceed north to the vicinity of the USS Elmer Montgomery to investigate[2]. A USS Vincennes helicopter, designated "Ocean Lord 25," was vectored to the north to investigate and to monitor the Iranian small boat activity. At 6:15 UTC, Ocean Lord 25, while operating in international airspace, was fired upon by small boats[3]. The USS Vincennes then took tactical command of the USS Elmer Montgomery and both ships proceeded to close the position of the helicopter and the small boats at high speed. At the same time, the USS Vincennes was tracking and communicating with an Iranian P-3 military surveillance aircraft, which had closed from about 60 to about 40 nautical miles[1].

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[1] ICAO Report, Appendix E, pp. E-7, E-26. Throughout this Memorial, the United States lists time as Co-ordinated Universal Time (UTC), as was done by the ICAO investigation team.

[2] ICAO Report, Appendix E, p. E-26.

[3] ICAO Report, Appendix A, p. A-1. At no time was the helicopter in Iranian internal waters. The helicopter was in international airspace approximately four nautical miles from Iranian territorial waters.

As the USS Vincennes and USS Elmer Montgomery approached the small boats, two groups of them were observed turning towards the USS Vincennes and USS Elmer Montgomery and commencing high-speed attack runs, which prior experience in the Gulf had shown to be quite dangerous methods of attack[2]. This closing action was interpreted as a demonstration of hostile intent to attack the U.S. vessels. The Commanding Officer of the USS Vincennes then requested and was granted permission by his immediate superior (the Commander, U.S. Joint Task Force Middle East) to engage the small boats with gunfire[1].

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[1] The USS Vincennes' command and control system is not capable of differentiating between different aircraft without an identification signal from the aircraft. When the USS Vincennes challenged the Iranian P-3 at 6:48:25 UTC (ICAO Report, Appendix B, p. B-17), the USS Vincennes had already been monitoring and communicating with the P-3 for a period of time (ICAO Report, Appendix A, p. A-1). Although the United States had an Airborne Warning and Control (AWAC) aircraft airborne at the time of the incident, it provided no link information; its radar is unable to provide coverage of the entire Persian Gulf area, which at that time included the area in which this incident occurred. ICAO Report, Appendix E, p. E-26.

[2] ICAO Report, Appendix E, pp. E-27-E-29; see ICAO Report, Appendix A, p. A-2; N. Friedman, "The Vincennes Incident", Naval Review Proceedings, p. 74 (1989) (Exhibit 39).

At approximately 6:43 UTC, the USS Vincennes and USS Elmer Montgomery opened fire on the two closing groups of Iranian small boats, including the group of small boats that had fired upon Ocean Lord 25[2]. The surface boats opened fire on the two U.S. warships. Although both U.S. and Iranian vessels were in international waters at the commencement of this engagement, during the 17-minute engagement it became necessary for the USS Vincennes, in defending itself, to maneuver into waters claimed by Iran as territorial waters[3].

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[1] ICAO Report, Appendix A, p. A-2; ICAO Report, Appendix E, p. E-27.

[2] ICAO Report, Appendix E, p. E-27.

[3] At the time the USS Vincennes fired its surface-to-air missiles (6:54 UTC), it was located at 26 30 47 N, 056 00 57 E. ICAO Report, para. 2.11.7. Since the USS Vincennes was under armed attack by Iranian small boats, it was clearly entitled to maneuver as necessary (including entry into Iranian territorial waters) as a matter of self-defense. Moreover, under the Treaty of Amity between the United States and Iran (Exhibit 8), Article X, paras. 5 and 6, a U.S. warship in distress is permitted to enter territorial waters claimed by Iran.

This surface engagement remained active from the time Iran Air Flight 655 took off from Bandar Abbas through the downing of Iran Air Flight 655. The crew of the USS Vincennes were at battle stations as Iranian gunfire was heard to ricochet off the USS Vincennes' starboard bow. (The post-action analysis indicated that shrapnel and/or spent bullets appeared to have hit the USS Vincennes and damaged the protective coating behind the forward missile launcher)[1]. During the engagement, the USS Vincennes experienced a "foul bore" or faulty discharge in the forward gun of its two guns capable of engaging surface targets. Consequently the Commanding Officer of the USS Vincennes ordered a full rudder at 30 knots to turn the ship around and bring the aft gun to bear in defending the USS Vincennes from the attacking gunboats. This caused the ship to list at a 30-degree angle, causing books, publications, and loose equipment to fall from desks and consoles in the USS Vincennes' Combat Information Center (CIC)[2].

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[1] ICAO Report, Appendix E, p. E-28.

[2] ICAO Report, Appendix A, p. A-7; Exhibit 9, Appendix E, pp. E-9, E-28.

Iran Air Flight 655 was scheduled to take off from Bandar Abbas International Airport at 6:20 UTC en route to Dubai Airport in the United Arab Emirates. Bandar Abbas is a joint military/civilian airport located 4.5 miles northeast of the town of Bandar Abbas. The flight did not leave on time, but left almost a half-hour (27 minutes) late. Such flights normally push away from the gate close to the scheduled departure time[1].

The unidentified aircraft (later identified as Iran Air Flight 655) was immediately detected by the USS Vincennes and the USS Sides, at a range of 47 nautical miles and closing on the U.S. vessels[2]. The approaching aircraft was thereafter monitored by the USS Vincennes' "Aegis" weapons system, which consists of an electronically-scanned radar system and large-screen display system integrated with the vessel's surface-to-air missiles. The large-screen display shows the relative speed and course of an aircraft using symbology[1]. The exact course, speed and altitude are displayed on a separate digital readout. The system cannot positively determine the size, type or character of an approaching aircraft. It is the responsibility of the personnel of the CIC to assist the ship's commanding officer in assessing the contact's nature and intent on the basis of all available information. In the few minutes available in this case, the CIC assessment was based on various factors, including: the contact's departure from a joint military/civil airfield; the direct course of the contact to the USS Vincennes; a perceived interception of an IFF Mode II signal (typically emitted by military aircraft); and the constantly closing range of the contact.

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[1] ICAO Report, paras. 1.1.1; 1.1.3; 1.1.4; 2.4.2. The statement in para. 3.1.7 of the ICAO Report that the flight departed 20 minutes after the scheduled time appears incorrect.

[2] ICAO Report, Appendix E, p. E-8.

Information on civilian flight schedules was available in the CIC. The ICAO Report, however, confirms that such information was of limited value in estimating overflight time of an aircraft. The Report states: "In the absence of flight plan and flight progress information, a realistic traffic picture could not be established and positive aircraft identification could not be obtained on that basis[1]." Moreover, the actual take-off time of Iran Air Flight 655 differed from its scheduled departure time, thus creating the appearance of an unidentified radar contact that could not be related to a scheduled time of departure for a civil flight[2].

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[1] On the Aegis display screen, an aircraft is displayed as a symbol; its speed is depicted by a vector attached to it. The higher the speed, the longer the vector. The vector's direction depicts the aircraft's course. The unidentified approaching aircraft was designated by the USS Vincennes as TN 4474 (subsequently changed to TN4131) and identified as an "unknown--assumed enemy". ICAO Report, Appendix A, p. A-3.

Although over a period of four minutes the U.S. vessels issued four warnings on the civil international air distress frequency (121.5 MHz VHF) and seven warnings on the military air distress frequency (243 MHz UHF), the U.S. vessels received no response from the rapidly approaching aircraft[1]. A non-hostile military aircraft would be expected to respond just as the Iranian P-3 in fact did respond to such warnings only minutes earlier, even though it was located much further away from the USS Vincennes[2]. Likewise civil aircraft would be expected to respond; under provisions of the Chicago Convention Annexes all civil aircraft are required to have equipment capable of communicating on 121.5 MHz, the international air distress frequency. Furthermore, all civil aircraft are expected, on long over-water flights, to monitor that frequency when the aircraft is in operation[1]. It is critical that this channel be monitored since military vessels, including U.S. military vessels, are usually not provided with equipment for VHF communications other than on this frequency. On 16 September 1986, Iran Air itself had issued to flight crews operating in the Gulf area a company advisory notice which required the monitoring of frequency 121.5 MHz at all times; the subsequent ICAO investigation determined that this notice was included in the briefing material for Iran Air Flight 655 of 3 July 1988 and therefore concluded that the Iran Air Flight 655 flight crew was aware of the instruction[2]. The ICAO investigation also concluded that there was no indication of failure of the communications equipment during the flight[3].

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[1] ICAO Report, paras. 2.8.3; 3.1.19. Consequently any assertion that the USS Vincennes knew Iran Air Flight 655 was expected to pass over at that time is wrong.

[2] ICAO Report, paras. 2.11.1; 3.1.23.

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[1] Iran asserts that the 121.5 MHz warnings never actually occurred or were incapable of being heard or understood. Iranian Memorial, at 55. The ICAO Report, however, confirms that these warnings were made and that without question the final one should have been clearly understood by Iran Air Flight 655 as directed at it. ICAO Report, para. 2.10. Further, Iran is wrong when it says that the United States admits the warnings were not clear and that Iran Air Flight 655 had good reason not to listen (Iranian Memorial, p. 54). Although the same information was not provided for all of the warnings, Iran Air Flight 655 had completed its take-off procedures and should have been monitoring the 121.5 MHz frequency; had it done so it would have realized that it was being addressed, just as the Iranian P-3 realized that it was being addressed.

For the period of 2 June to 2 July 1988, U.S. military vessels in the Gulf issued 150 challenges to unidentified aircraft, of which 83 percent proved to be Iranian military aircraft, including F-14s. ICAO Report, Appendix E, p. E-18.

[2] ICAO Report, Appendix A, pp. A4-A5.

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[1] Chicago Convention, Annex 6, para. 7.1.2 (Exhibit 2); Chicago Convention, Annex 10, paras. 5.2.2.1.1.1, 5.2.2.1.1.2, and 5.2.2.1.1.3 (Exhibit 3).

[2] ICAO Report, paras. 2.7.3; 3.1.14.

[3] ICAO Report, para. 3.1.3.

Given the requirements of the Annexes to the Chicago Convention and Iran Air's instructions, it is unclear why Iran Air Flight 655 did not respond to the repeated warnings of the U.S. armed forces.

There does not appear to be any practical reason why Iran Air Flight 655 was not monitoring this channel and did not respond to the warning. The aircraft was equipped with two radios; therefore it was technically feasible (as well as extremely prudent given the state of affairs in the Gulf) to undertake all normal cockpit responsibilities on one radio and monitor frequency 121.5 MHz on the other. Furthermore, the crew of Iran Air Flight 655 could speak English and, for at least the last two warnings issued over 121.5 MHz, the crew was not engaged in routine communications with any air traffic controllers. The fourth and final challenge on this frequency would have been without question recognizable by the crew as intended for them, and almost a minute elapsed between that final warning and the firing of the USS Vincennes' missiles[1].

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[1] ICAO Report, para. 2.10.18. The fourth challenge was issued at 6:53:25 UTC and the missiles were launched at 6:54:22 UTC. ICAO Report, para. 2.11.5.

The Bandar Abbas airport tower is also equipped with the 121.5 MHz channel, but curiously the airport authorities claimed in statements to ICAO that it did not hear or record transmissions on this frequency[1]. Had it been monitoring the frequency, Bandar Abbas might have been in position to assist in warning Iran Air Flight 655. It is also curious that the Iranian P-3 did not seek to assist Iran Air Flight 655, since it was clearly monitoring the military distress frequency over which seven warnings were issued.

Nor does it appear that Iranian authorities used their own procedures for protecting Iran Air Flight 655 from the hazard of flying into an area of active hostilities. Iranian military authorities did not activate the "red alert" procedure normally used to notify air traffic control centers of military activities which posed a risk to the safety of civil aircraft. As was noted in the ICAO investigation report, in some instances Iranian aircraft already off the ground were successfully recalled by using this "red alert" process[1]. This failure by the Iranian military to alert Iranian air traffic authorities was wholly unjustifiable, and can only be viewed as either intentional or grossly lacking in judgment; not only were Iranian authorities aware that hostile action was in progress directly under a civil air corridor, but they had initiated the hostile action themselves by firing on a U.S. helicopter in international airspace and by commencing a high-speed attack on U.S. naval vessels.

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[1] ICAO Report, para. 2.10.7. The existence of these warnings is not in question. The ICAO investigation found that the warnings were issued, based on both United States records and those of the British vessel HMS Beaver. For transcripts of communications related to Iran Air Flight 655, see ICAO Report, Appendix B.

Without any response from Iran Air Flight 655, the USS Vincennes had to rely on other sources of information. First, intelligence information available to the U.S. Joint Task Force Middle East indicated the deployment of Iranian F-14 fighters to Bandar Abbas against the background of expected heightened hostile activities around the 4 July weekend[2]. Only weeks earlier, Iranian military aircraft had been scrambled from

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[1] ICAO Report, para. 2.5.1.

[2] ICAO Report, para. 2.11.1; ICAO Report, Appendix E, pp. E-13, E-43.

Bandar Abbas to assist in interdiction of U.S. vessels in this part of the Gulf[1]. As was noted by the ICAO Report, "the possibility of Iranian air support in the surface engagements with United States warships could not be excluded in view of precedent albeit not with F-14 type fighter aeroplanes[2]."

Second, immediately prior to the warnings to Iran Air Flight 655, the USS Vincennes was monitoring an Iranian P-3 military patrol aircraft to the west of the USS Vincennes. The P-3 can serve (and had frequently served) as a "stand-off" aircraft to assist Iranian fighter aircraft in finding and accurately attacking vessels[3].

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[1] See above, p. 21.

[2] ICAO Report, para. 2.11.1.

[3] The P-3 was flying a routine morning patrol to the West and then turned inbound during the surface engagement. ICAO Report, Appendix E, pp. E-7, E-45, E-48. This represents a typical targetting profile of standing clear of the target but remaining within range. N. Friedman, op. cit., Exhibit 39, p. 74.

Third, the constantly approaching aircraft was initially identified as an Iranian F-14 and did not emit certain electronic emissions that could be expected from a civil aircraft, such as aircraft weather radar and radio altimeter. The USS Vincennes was receiving other information that did not correlate with what would normally be the case for an attacking military aircraft[1], but there was very little time to conduct an accurate assessment of the aircraft's flight profile[2]. Further, the lack of response to the warnings on frequencies 121.5 MHz and 243 MHz reinforced the belief that the aircraft was engaged in a hostile mission[3].

Fourth, while the constantly approaching aircraft was within the corridor of airway A59, it was also tracked on a course straight towards the USS Elmer Montgomery and the USS Vincennes slightly diverging from the centerline of airway

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[1] ICAO Report, para. 2.9.

[2] From the time the Commanding Officer first became aware of the approaching aircraft until he made his decision to fire, the elapsed time was approximately 3 minutes, 40 seconds. ICAO Report, Appendix E, p. E-47.

[3] ICAO Report, para. 2.11.2.

A59[1]. Iranian military aircraft had been known to follow the commercial air routes within the Persian Gulf and even to have squawked on all IFF (I, II, and III) modes and codes, presumably as a means of disguising their military identity[2].

At 6:51 UTC, the USS Vincennes informed the U.S. Commander of the Joint Task Force Middle East (CJTFME) that it had what it believed to be an Iranian F-14 on a constant bearing and decreasing range which it intended to engage at 20 nautical miles unless the aircraft turned away. The CJTFME concurred and told the USS Vincennes to warn the aircraft again before firing[3]. The aircraft closed to within 20 nautical miles, but the USS Vincennes continued its concerted efforts to warn off the aircraft, placing itself at risk of attack. At approximately 6:54 UTC, after the eleven warnings were not answered or acknowledged, the USS Vincennes fired two missiles which intercepted the approaching aircraft at a range of eight nautical miles from the USS Vincennes[1].

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[1] ICAO Report, para. 3.1.24. The fact that an aircraft is within a commercial air corridor is not surprising in the Gulf; a total of 18 commercial air routes cross the Gulf, covering at least 50% of Gulf's navigable waters. ICAO Report, Appendix E, p. E-16.

[2] ICAO Report, Appendix E, p. E-18. For example, at 6:51 UTC on 3 July 1988 -- right before Iran Air Flight 655 was shot down -- an Iranian military C-130 took off from Bandar Abbas using the same air corridor as used by Iran Air Flight 655. ICAO Report, Appendix A, p. A-8. It is contrary to recommended ICAO practice for military aircraft to squawk on other than Mode II.

[3] ICAO Report, Appendix E, pp. E-35-E-36.

The United States offered rescue and recovery assistance to the Government of Iran regarding Iran Air Flight 655, but Iran did not respond to the United States[2].

The USS Vincennes fired its missiles because its Commanding Officer perceived the approaching aircraft to be an Iranian military aircraft with hostile intentions[3]. Although Iran has since the time of this incident sought to equate it with previous shootdowns of civil aircraft -- such as the shootdown of Korean Air Lines Flight 007 in 1983 -- this comparison is not sustainable. Unlike the 1983 incident, the incident of 3 July 1988 involved the rapid approach of an unidentified foreign aircraft to a warship that was itself engaged in armed conflict initiated by the country of the aircraft's registry. ICAO's treatment of the two incidents evidences the international recognition that the incidents are not comparable.

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[1] The surface engagement with the Iranian gunboats ended about 10 minutes after the USS Vincennes fired its missiles. ICAO Report, Appendix A, pp. A-10 and A-12.

[2] ICAO Report, Appendix E, pp. E-45-E-46.

[3] ICAO Report, paras. 2.11.5 and 3.2.1. The conduct of the USS Vincennes was criticized in an article written by the Commanding Officer of the USS Sides a year after the incident occurred. See D. Carlson, "Comment and Discussion", Proceedings, pp. 87-92 (Sep. 1989) (Exhibit 40). That article, which appeared in a non-U.S. Government publication, represents one point of view regarding certain aspects of the Iran Air Flight 655 incident, just as other articles on this incident in the same publication represented wholly different views. See, e.g., N. Friedman, op. cit., Exhibit 39, pp. 72-80. Notwithstanding Commander Carlson's reflections, the Commanding Officer of the USS Vincennes perceived that his ship was under the threat of an imminent attack.

CHAPTER III

ONCE IT BECAME KNOWN THAT THE AIRCRAFT SHOT DOWN WAS A CIVILIAN AIRLINER, THE UNITED STATES INVESTIGATED THE INCIDENT WITH A VIEW TO PREVENTING SUCH TRAGEDIES IN THE FUTURE AND SOUGHT TO COMPENSATE THE FAMILIES OF THE VICTIMS, WHILE IRAN IMMEDIATELY SOUGHT POLITICAL CONDEMNATION OF THE UNITED STATES BY THE UNITED NATIONS AND THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO).

The responses of the United States and Iran to this incident were different. The United States immediately sought on its own and in conjunction with ICAO to investigate the incident with the objective of determining what happened and how to avoid such tragedies in the future. Furthermore, the United States also immediately expressed its regret and announced its intent to provide compensation for the families of the victims of Iran Air Flight 655. In due course, the United States contacted Iranian authorities to obtain information on which to base the specific level of payments to be offered to the families of the victims.

Iran, however, made no effort to discuss this incident with the United States, let alone negotiate or arbitrate any disputes between them. Rather, Iran immediately and unsuccessfully sought political condemnation of the United States at the United Nations Security Council and ICAO. Iran essentially ignored repeated efforts by the United States to gather information on the victims and their families.

Neither the Security Council nor ICAO heeded Iran's demand for political condemnation. The Security Council on 20 July 1988 adopted by consensus (including the United States) a resolution expressing its "deep distress" at the downing of Iran Air Flight 655.

At the conclusion of an Extraordinary Session of the ICAO Council in July 1988, the Council resolved inter alia to conduct a fact-finding investigation to determine all relevant facts and technical aspects of the incident. The purpose of the investigation was generally to help safeguard civil aviation, and specifically to examine possible revisions to ICAO standards and recommended practices, as necessary. Once the investigation report was completed by a team of experts, the ICAO Council (with the United States and Iran participating) discussed the report. In December 1988, the Government of Iran sought to have the report examined to identify any violations of the Chicago Convention and drew the Council's attention to Article 54 of that Convention. However, Iran did not request that the Council undertake dispute-resolution procedures under Article 84 of the Chicago Convention, nor did Iran seek to apply the comprehensive and exclusive ICAO Rules for the Settlement of Differences promulgated to address disputes arising under that Article.

The Council dealt with this matter in its policy capacity under Articles 54 and 55 of the Chicago Convention, which do not contemplate appeals to this Court.

The Council referred the investigation report to the Air Navigation Commission (ANC) and, in March 1989, adopted by consensus a wide-ranging resolution that, inter alia, noted the report of the fact-finding investigation and endorsed the conclusions of the Air Navigation Commission on the report's safety recommendations. This resolution did not decide a "disagreement" under Article 84 of the Chicago Convention, and the proceedings had no relation whatsoever with Article 84. Frustrated with its failure to obtain condemnation of the United States through the political and technical proceedings of the ICAO Council, Iran now seeks to recharacterize to this Court the ICAO proceedings and resolution as falling under Article 84.

Section I. The United States Immediately Announced Its Intention to Compensate the Families of the Victims of Iran Air Flight 655 While at the Same Time Investigating the Incident and Taking Steps to Avoid Its Recurrence.

Unlike Iran, which sought political condemnation of the United States at the U.N. Security Council and at ICAO, the United States undertook immediate steps to offer compensation to the families of the victims, to approach Iran for the purpose of paying this compensation, to investigate the incident, and to take steps to improve safety guidelines where possible.

Although the United States announced its intention to compensate the families of the victims and approached the Government of Iran to work out the details of such compensation, the Government of Iran ignored the United States' offer. Shortly after the general facts of the incident had been confirmed, President Reagan expressed his regret that Iran Air Flight 655 had been shot down and his condolences to the families of the victims. These sentiments were also publicly stated by the Vice President and other U.S. officials.[1]

In addition, on 11 July 1988, the White House announced that the United States would offer compensation to the families of the victims, with details concerning amounts, timing, and other matters to be worked out. On 13 July 1988, U.S. Assistant Secretary of State Richard S. Williamson announced this offer to the ICAO Council, in the presence of a representative of Iran, stating that "the United States is prepared to provide compensation to the families of the victims, of all nationalities, who died in this accident." Then-Vice President George Bush also confirmed this offer in the presence of a representative of Iran in his speech to the U.N. Security Council on 14 July 1988: "It is a strongly felt sense of common humanity that has led our government to decide that the United States will provide voluntary, *ex gratia* compensation to the families of those who died in the crash of #655[1]."

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[1] Statement of President Ronald Reagan, 3 July 1988; White House Statement, 11 July 1988; Address by Assistant Secretary of State Richard S. Williamson to the ICAO Council, 13 July 1988; Statement of Vice President George Bush to the U.N. Security Council, 14 July 1988. These statements are reprinted in Department of State Bulletin, pp. 38-43 (Sep. 1988) (Exhibit 25).

To implement its compensation plan, however, the United States needed specific and accurate information about the victims, including their ages and earning capacity, and their families. Due to the lack of diplomatic relations between Iran and the United States, this could not be done through normal diplomatic channels. Consequently, the United States approached the Government of Switzerland, which acts as the protecting power with respect to U.S. interests in Iran, to have the Swiss Government act on behalf of the United States in this matter[1]. On 23 September 1988, the Swiss Government undertook to approach the Government of Iran to determine whether it would allow the Swiss Government to act as an intermediary for purposes of gathering information and distributing compensation[2]. On 23 January 1989, having received no response, the United States orally requested the Swiss Government to follow up.

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[1] Statement of Vice President George Bush to the U.N. Security Council, 14 July 1988 (Exhibit 25).

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[1] U.S. Cable dated 31 Aug. 1988, from Washington, D.C. to Berne, Switzerland instructing the U.S. Embassy to approach the Swiss Ministry of Foreign Affairs to request that it serve as an intermediary with the Government of Iran; U.S. Cables of 2 and 6 Sep. 1988, from U.S. Embassy, Berne, Switzerland to Washington, D.C. reporting Swiss Government reaction; U.S. Cable dated 23 Sep. 1988, from Washington, D.C. to U.S. Embassy, Berne, Switzerland providing U.S. Embassy additional guidance and noting that the next step would be for the Swiss to determine Iran's disposition to Swiss involvement in this matter (Exhibit 29).

[2] U.S. Cable dated 26 Sep. 1988, from U.S. Embassy, Berne, Switzerland to Washington, D.C., reporting Swiss Government agreement to approach the Government of Iran (Exhibit 29).

On 8 February 1989, the Iranian Department of Foreign Affairs provided the text of a letter to the Swiss Government from the "Iran Insurance Company[1]". The letter asserted that the Iran Insurance Company claimed all of the financial damages arising out of the incident, both for persons and for the aircraft. Further, the letter said that the Company "declares its readiness to introduce its representative in order to determine the amount of the damages and the method for collection." However, no further messages were received from the Iran Insurance Company designating such a representative.

On 30 March 1989, the United States requested the Swiss Government to transmit to the Government of Iran a diplomatic note enclosing a letter to the Iran Insurance Company, asking it to provide specific kinds of information on the victims and their families, and to identify whether it was an entity of the Government of Iran. The Government of Switzerland did so on 16 April 1989[1].

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[1] U.S. Cable dated 8 Feb. 1989, from U.S. Embassy, Berne, Switzerland to Washington, D.C. transmitting letter of the Iran Insurance Company under cover of an Iranian Department of Foreign Affairs transmittal note (Exhibit 29).

Having still received no response from the Government of Iran or the Iran Insurance Company through the Government of Switzerland, the United States asked the Swiss Government on 13 June 1989, to transmit both a note to the Government of Iran and a letter to the Iran Insurance Company again requesting that specific kinds of information be provided on the victims and their families by July 1989. The Government of Switzerland did so on 20 June 1989[1]. No response from Iran was received.

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[1] U.S. Cable dated 30 Mar. 1989, from Washington, D.C. to U.S. Embassy, Berne, Switzerland, instructing Embassy to request the Swiss Government to transmit a letter to the Iran Insurance Company; U.S. Cable dated 31 Mar. 1989, from U.S. Embassy, Berne, Switzerland to Washington, D.C., reporting request made to the Swiss; Dip. Note 43, 16 Apr. 1989, from Embassy of Switzerland in Iran to the Iranian Ministry of Foreign Affairs enclosing a letter to the Iran Insurance Company in English and Persian (Exhibit 29).

On 17 May 1989, the Government of Iran filed its Application before the Court. In it, Iran stated in a footnote:

> "under the circumstances and in particular the United States total refusal of all voluntary methods of pacific settlement of the present dispute, the arbitration referred to in Article 14(1) of the Montreal Convention cannot be considered as a viable course of action."

The United States ultimately concluded that Iran was either unwilling or unable to share this information. Because of this, and because of difficulties generally in obtaining this type of information, the United States decided to develop an alternate compensation plan that would provide for essentially uniform payments per victim, rather than based on the victim's actual earnings and life expectancy. Under this plan, the family of each wage-earning victim was offered $250,000, to be divided among the surviving parents, spouse, and children (families of non-wage earning victims were offered $100,000 each)[1]. Although the United States did not and does not now admit any liability in making this offer of compensation, the amounts offered were calculated in light of international legal standards, and were in fact quite generous in comparison to international practice with respect to comparable victims.

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[1] Copy of U.S. Diplomatic Note of 13 June 1989 to the Government of Switzerland, enclosing the text of a note verbale to the Government of Iran and the text of a letter to the Iran Insurance Company; Copy of a Swiss Diplomatic Note of 26 June 1989 to the United States reporting its transmittal to Iran and the Iran Insurance Company on 20 June 1989 (Exhibit 29).

This compensation plan was communicated directly to the five governments other than Iran that had nationals on board Iran Air Flight 655. On 11 July 1989, the United States requested the Government of Switzerland to deliver a note to the Government of Iran explaining the new U.S. compensation plan, which was developed on the basis of uniform payments. The Government of Switzerland did so on 12 July 1989[2]. The compensation plan was subsequently announced publicly[1]. Since that time, of the seventy-nine identified family members of non-Iranians eligible to receive compensation, thirty-two have accepted and have been paid such compensation, for a total of US $1,838,998. (The others are either in the process of being paid or have elected to pursue suits in U.S. courts.) None of the Iranian family members have received compensation, due to the Government of Iran's decision to pursue these proceedings and to preclude separate recovery by its nationals.

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[1] This may be compared with the approximately US $20,000 (250,000 gold francs) ceiling per victim for claims that may be brought against an air carrier under the Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded 12 Oct. 1929, 137 LNTS 11, (commonly referred to as the "Warsaw Convention"), as amended by the Hague Protocol of 28 Sep. 1955, 478 UNTS 371 (to which Iran is a party).

[2] U.S. Diplomatic Note of 11 July 1989 to the Government of Switzerland requesting transmittal of a note verbale to the Government of Iran; Swiss Diplomatic Note of 12 July 1989 to the Government of Iran (Exhibit 29).

The United States conducted an immediate and thorough investigation to ascertain the circumstances of the incident. Immediately after the incident, the United States convened its own investigation into the circumstances of the downing of Iran Air Flight 655. The investigation was conducted by Rear Admiral William M. Fogarty, U.S. Navy, whose team arrived in

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[1] Department of State Daily Press Briefing, pp. 2-4 (17 July 1989) (Exhibit 30).

To date, the United States has only been able to make payments to the families of non-Iranian victims because Iran has chosen to litigate this matter before this Court and has forbidden its nationals from accepting U.S. payments or otherwise settling their claims outside the context of the suit before this Court.

Bahrain on 5 July 1988, and began formal hearings on 13 July. Statements and testimony of witnesses were taken, the relevant naval vessels were inspected, and information was collected and collated with respect to the professional training of the USS *Vincennes* crew, the situation in which it was placed on 3 July, and the details of Iran Air Flight 655. The report was published and communicated to ICAO on 28 July 1988[1]. The most salient conclusions of the report were:

> "1. The USS VINCENNES did not purposely shoot down an Iranian commercial airliner. Rather, it engaged an aircraft the Commanding Officer, USS VINCENNES believed to be hostile and a threat to his ship and to the USS MONTGOMERY (FF 1082).
>
> 2. Based on the information used by the CO in making his decision, the short time frame available to him in which to make his decision, and his personal belief that his ship and the USS MONTGOMERY were being threatened, he acted in a prudent manner.
>
> 3. Iran must share the responsibility for the tragedy by hazarding one of their civilian airliners by allowing it to fly a relatively low altitude air route in close proximity to hostilities that had been ongoing for several hours, and where IRGC gunboats were actively engaged in armed conflict with U.S. Naval vessels.

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[1] ICAO Report, Appendix E.

> 4. The downing of Iran Air 655 was not the result of any negligent or culpable conduct by any U.S. Naval personnel associated with the incident[1]."

This report was given considerable weight by the ICAO investigating team and by the ICAO Council (discussed below); it is appropriate for this Court to do so as well. The report represents an early, contemporaneous review of the events that occurred on 3 July 1988, based on interviews with servicemen on the relevant U.S. vessels. A remarkable aspect of the investigation was the availability of the USS Vincennes' data recordings, which enabled the investigation team to break down the critical time period of the shootdown into a "minutes and seconds sequence" of actions as they occurred on the USS Vincennes[2].

Iran could have conducted its own investigation of the incident and submitted to ICAO and to this Court any results of that investigation, which would have then allowed the Court to weigh both reports. For its own reasons, however, Iran chose not to do so. Had Iran done so, Iran could have explained why its gunboats were threatening merchant vessels and engaging in hostile acts with U.S. vessels, why Iran did not issue a red alert to civil aircraft once hostile action occurred between Iranian and U.S. forces, and why neither Bandar Abbas nor Iran Air Flight 655 monitored the civil distress frequency of 121.5 MHz. Instead, Iran chooses to make maximum use for its own purposes of the open and candid U.S. Government reports and testimony, while withholding any comparably open and candid assessments of its own conduct.

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[1] ICAO Report, Appendix E, p. E-46.

[2] At the time Iran Air Flight 655 was shot down, the Commanding Officer of the USS Vincennes did not know all of the information included in the U.S. investigation report. Rather, the U.S. Investigation Report reflects a thorough attempt by the United States in the aftermath of the incident to determine the details of the incident from various sources.

The United States took steps to improve international procedures to avoid recurrence of such an incident. The United States has one of the largest civil aircraft fleets in the world and consequently has always been strongly committed to the safety of international civil aviation. Consequently, it has promoted improvements toward this end in the relevant provisions of the Annexes to the Chicago Convention and other documents, as well as international operating practices. In the aftermath of the 3 July 1988 incident, U.S. civilian and military experts met with ICAO to discuss concrete steps that could prevent incidents of this type in the future. As a result of the U.S. military investigation, as well as comparable subsequent findings by the ICAO investigation, the United States undertook various steps to help preclude any further incidents of this type. The United States also pursued generally the objective of improved military and civilian coordination through meetings in Montreal in August 1988 and again in January 1989 with officials of ICAO, the International Federation of Airline Pilots Associations, and the International Air Transport Association.

Section II. The Government of Iran Did Not Approach the United States Either Directly or Indirectly, but Rather Immediately Sought Political Condemnation of the United States by the United Nations and ICAO.

In the aftermath of the Iran Air Flight 655 incident, the Government of Iran did not approach the United States, whether to seek an explanation, information, apology, or reparation. This was the case even though the United States and Iran have communicated frequently since the breaking of diplomatic relations in 1980 through the good offices of their two protecting powers, the Government of Switzerland and the Government of Algeria, and have directly settled and arbitrated claims between each other on a daily basis before the Iran-U.S.

Claims Tribunal in The Hague[1]. In many cases, these claims have involved monetary amounts, and political implications, far exceeding those involved in the present case. Iran's only response, however, was immediately to raise the incident in two multilateral fora, the United Nations and the ICAO, and to seek political condemnation of the United States.

The day after the incident, Iran sent a letter to the U.N. Secretary-General, stating that it expected the United Nations to condemn the United States' actions and to take immediate steps to compel the United States to remove its naval forces from the Gulf[2]. The U.N. Security Council convened to discuss the incident on 14 July 1988; after its deliberation, the Security Council on 20 July unanimously adopted a resolution expressing its "deep distress" at the downing of an Iranian civil aircraft[1].

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[1] The Iran-U.S. Claims Tribunal is a product of the 1981 Algiers Accords, which led to the release of the U.S. hostages held by the Government of Iran in Tehran. The Iran-U.S. Claims Tribunal is empowered to decide, through binding arbitration, both private and intergovernmental claims arising from the Islamic Revolution in Iran and the resulting disruption in commercial and economic relations between Iran and the United States. The Algiers Accords are reprinted in Vol. 1, Iran-U.S. Claims Tribunal Reports; in Department of State Bulletin, p. 1 (Feb. 1981); and in 20 I.L.M. 230 (1981).

[2] Letter dated 3 July 1988 from the Acting Permanent Representative of the Islamic Republic of Iran to the U.N. Addressed to the Secretary-General, U.N. Doc. S/19979 (Exhibit 26).

On the very day of the shootdown -- 3 July 1988 -- the Iranian Vice Minister of Roads and Transportation sent two telexes to ICAO Council President Assad Kotaite informing him of the downing of Iran Air Flight 655. In the telexes, Iran requested President Kotaite to "take effective measures in condemning said hostile and criminal acts", and invited President Kotaite and his experts "to have a visit and study of this inhuman act of U.S.A. in Persion Gulf [sic] promptly[2]".

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[1] Res. 616, U.N. Sec. Council (2821st meeting, 20 July 1988), U.N. Doc. S/RES/616 (Exhibit 28). The debate of the Security Council (2818th to 2821st meetings, July 1988) is contained in U.N. Docs. S/PV.2818 to S/PV.2821. Complete copies of these documents have been deposited in the Registry pursuant to Article 50 of the Rules of Court.

It must also be noted that Iranian gunboat attacks against commercial shipping continued even after the incident of 3 July 1988. For instance, on 7 July 1988, an Iranian speedboat attacked the Romanian merchant vessel Plataresti. "Iranian Speedboats Attack Romanian Ship", FBIS, 11 July 1988, p. 14.

[2] Telexes from the Islamic Republic's Vice-Minister of Roads and Transportation dated 3 July 1988, attached to letter dated 4 July 1989 from ICAO Council President to ICAO Council Representatives, ICAO Doc. PRES AK/165 (Exhibit 10).

This was followed on 4 July by a telex by the Iranian Vice Minister of Roads and Transportation requesting that "this grave matter be tabled in the ICAO Council as a matter of urgency with the view that an extraordinary session of ICAO Assembly be urgently convened to conduct a thorough investigation of all aspects of the catastrophe[1]."

None of these telexes referenced any specific provision of the Chicago Convention as the basis for Iran's request, much less purported to be bringing an "application" to the Council under Article 84. Indeed, the 4 July telex requested that the ICAO Assembly be convened. Under Article 48 of the Chicago Convention, an extraordinary meeting of the Assembly may be held upon the call of the ICAO Council, which is established under the Chicago Convention as ICAO's 33-member permanent governing body. President Kotaite notified Iran on 4 July 1988 that he was "consulting the members of the Council concerning the convening of an extraordinary session of the Council"

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[1] Exhibit 10, Telex from the Islamic Republic's Vice-Minister of Roads and Transportation dated 4 July 1988.

(emphasis added)[1]; he then agreed on 5 July 1988 to convene such a session, to begin on 13 July[2].

Section III. The ICAO Council Resolved to Undertake an Investigation of the Incident for the Purpose of Taking Steps to Ensure Safety of Civil Aviation.

On 13 and 14 July, 1988, the ICAO Council met to consider the request from the Government of Iran. Not being a member of the ICAO Council, Iran was invited to participate in the consideration of the incident without a vote, and was represented at the session, in accordance with Article 53 of the Chicago Convention and Rule 32 of the Rules of Procedure of the Council.

Iran's request to the Council had not been framed as a difference or disagreement on the interpretation or application of the Chicago Convention or of the Montreal Convention[3].

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[1] Letter dated 4 July 1989 from ICAO Council President to ICAO Council Representatives, op. cit., Exhibit 10.

[2] Letter dated 5 July 1989 from ICAO Council President to ICAO Council Representatives, ICAO Doc. PRES AK/166 (Exhibit 11).

[3] Letter dated 26 May 1989 from Dr. Michael Milde, ICAO Legal Bureau Director, to the Court (Exhibit 24).

Rather, President Kotaite, in introducing this matter on the ICAO Council agenda, described the purpose of the Council's work as follows:

> "The imperative task for the Council now is to collect all vital information and to reach a complete technical understanding of the chain of events which led to this tragedy. We have to explore every element of our international regulations in the ICAO Standards, Recommended Practices, guidance material and procedures which could prevent the repetition of a similar tragedy, not only in the area where this tragic incident occurred but anywhere else in the world[1]."

With this mandate, the ICAO Council did not treat the matter under consideration as a dispute between two Parties to be resolved under Article 84 of the Chicago Convention. During the course of the ensuing discussions, all the Council members, including the United States, agreed with the President's view that the role of the Council would be to undertake an investigation of the incident and to promote improvements in the Chicago Convention Annexes and other documents as may be necessary. The Observer from Iran never challenged this characterization of the role of the Council. When the debate on 13 July concluded, the President summarized the debate and, without objection from Iran, asked that the Council's deliberations be restricted to the technical aspects surrounding the 3 July 1988 incident, with a view to determining a complete technical understanding of the chain of events which had led to the incident and to developing technical preventative measures to ensure the safety and security of international civil aviation[1]. There is no indication that any of the Council Members or Iran believed that the Council was acting under Article 84 of the Chicago Convention or referred in any way to that Article.

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[1] Minutes, ICAO Council (extra. sess., 13 July 1988), ICAO Doc. DRAFT C-Min. EXTRAORDINARY (1988)/1, p. 4 (Exhibit 13).

The next day, 14 July, the ICAO Council approved by consensus (including the United States) as its decision a statement by President Kotaite that expressed condolences to Iran and to the families of the victims, deplored the use of weapons against civilian aircraft, and instituted a fact-finding investigation[2]. The debate preceding this statement indicates that the investigation was undertaken by the Council pursuant to its authority under Article 55(e) of the Chicago Convention. At no time during the Council's proceedings on 13-14 July 1988 did any participant, including Iran, refer to Article 84 of the Chicago Convention. Nor was any mention made of the ICAO Rules for the Settlement of Differences, the exclusive basis for bringing Article 84 disputes before the Council. Instead, the investigation was ordered under Article 55(e) of the Chicago Convention rather than Article 8 of the Rules for the Settlement of Disputes. This reflects that the Council believed it was carrying out a broad mandate in its role as a technical and policy body and not as a quasi-judicial body[1].

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[1] Exhibit 13, p. 40.

[2] Minutes, ICAO Council (extra. sess., 14 July 1988), ICAO Doc. DRAFT C-Min. EXTRAORDINARY (1988)/2, pp. 9-10 (Exhibit 14)

From 29 July through 28 September 1988, an ICAO investigation team (composed of five aviation experts from the ICAO Secretariat of diverse nationalities) travelled to the Middle East, London, and Washington to investigate the incident. The United States cooperated fully in this investigation. The team was given a full briefing at the

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[1] See discussion infra at Part III, Chapter II, section II.

Pentagon in Washington, D.C., and by the Commander of the U.S. Joint Task Force Middle East and his staff in the Gulf area, including a tour of the USS Vincennes. ICAO President Kotaite, ICAO Secretary General Sidhu and other ICAO officials visited the Aegis Combat Systems Engineering Development Center in Moorestown, New Jersey, where they received briefings on the computerized Aegis system that was employed on the USS Vincennes at the time of the incident. The investigation team asked for and received information from the Government of Iran. The team also visited the Iranian Civil Aviation Authority in Tehran, the Tehran area control center, Iran Air headquarters in Tehran, and the Bandar Abbas airport, tower and approach control unit, and Iran Air station[1].

On 7 November 1988, the ICAO report was completed and distributed. The report provided a review of the factual background to the flight as well as an analysis of the facts and certain conclusions. The report generally corroborated the conclusions of the U.S. Investigation Report as to the causes of the accident. The ICAO Report found that the causes of the incident were:

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[1] Working Paper (11 Nov. 1988), ICAO Doc. C-WP/8708, restricted, para. 2 (Exhibit 9).

> "3.2.1 The aircraft was perceived as a military aircraft with hostile intentions and was destroyed by two surface-to-air missiles.
>
> 3.2.2 The reasons for misidentification of the aircraft are detailed in the findings (paragraphs 3.1.23 and 3.1.24)."

Paragraphs 3.1.23 and 3.1.24 of the ICAO Report are as follows:

> "3.1.23. The initial assessment by USS Vincennes that the radar contact (IR655) may have been hostile, was based on:
>
> a) the fact that the flight had taken off from a joint civil/military aerodrome;
>
> b) the availability of intelligence information on Iranian F-14 deployment to Bandar Abbas and the expectation of hostile activity;
>
> c) the possibility of Iranian use of air support in the surface engagements with United States warships;
>
> d) the association of the radar contact with an unrelated IFF mode 2 response; and
>
> e) the appearance of an unidentified radar contact that could not be related to a scheduled time of departure of a civil flight.
>
> 3.1.24. The continued assessment as a hostile military aircraft by USS Vincennes and the failure to identify it as a civil flight were based on the following:
>
> a) the radar contact had already been identified and labelled as an F-14;

b) the lack of response from the contact to the challenges and warnings on frequencies 121.5 MHz and 243 MHz;

c) no detection of civil weather radar and radio altimeter emissions from the contact;

d) reports by some personnel on USS Vincennes of changes in flight profile (descent and acceleration) which gave the appearance of manoeuvering into an attack profile; and

e) the radar contact was tracked straight towards USS Montgomery and USS Vincennes on a course slightly diverging from the centreline of airway A59."

On 5-7 December 1988, the ICAO Council met in Montreal to consider the ICAO report. Iran was critical of the ICAO report, largely because Iran believed it relied in part on information contained in the U.S. military investigation[1]. Most other Council members, however, commended the ICAO team for its report. Iran also pressed the Council to condemn the shootdown, but the Council resolved by consensus to defer substantive consideration of the report until the 15-member ICAO Air Navigation Commission (ANC) had an opportunity to consider the report and to recommend any improvements in ICAO standards and recommended practices[1]. As was the case for the Council's meetings in July 1988, at no time during the Council's proceedings on 5-7 December 1988 did any participant, including Iran, refer to Article 84 of the Chicago Convention. Nor was any mention made of the ICAO Rules for the Settlement of Differences, the exclusive basis for bringing Article 84 disputes before the Council.

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[1] Although Iran criticized the ICAO Report before the ICAO Council, Minutes, ICAO Council (126th sess., 13 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/18 (Exhibit 19), the ICAO report is the product of an objective investigation by independent experts of a highly specialized international organization. Although Iran may not like the fact that much of the ICAO Report confirms the findings of the U.S. investigation report, the fact is that essentially the same information available to the U.S. investigation team was available to the ICAO investigating team, for it to review and determine on its own the probative value of such information. The ICAO investigation team impartially obtained, reviewed, and weighed for accuracy information received both from the Government of Iran and from the United States. The United States respectfully urges the Court to accept the report of the ICAO investigation as an authoritative finding with regard to the incident of 3 July 1988.

During January and February of 1989, the ANC reviewed the ICAO report and found that no significant improvements were needed in the ICAO standards and recommended practices.

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[1] See Minutes, ICAO Council (125th sess., 7 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/14 (Exhibit 17). The Air Navigation Commission (ANC) is a technical body established under the Chicago Convention composed of aviation experts appointed by the ICAO Council from persons nominated by Contracting States. Chicago Convention, Article 56. Article 56 provides that "[t]hese persons shall have suitable qualifications and experience in the science and practice of aeronautics."

Essentially, the ANC concluded that existing ICAO procedures, if properly implemented, were adequate to preserve the safety of civil aviation[1].

Consequently, during 13-17 March 1989, the ICAO Council met again in Montreal to undertake substantive consideration of the ICAO report and the recommendations of the ANC[2]. Iran once again asked that the shootdown be condemned by the Council. In response to a motion by the Soviet Union and Czechoslovakia, the ICAO Council voted on whether the resolution should contain language condemning the United States. By a vote of six in favor, 19 against, and six abstentions, the motion was defeated[1]. All 31 Council members present at the meeting, including the United States, voted on that motion. No objection was raised to the United States' participation in the vote.

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[1] Minutes, ICAO Air Navigation Commission (2 Feb. 1989), ICAO Doc. AN. Min. 120-6; Minutes, ICAO Air Navigation Commission (7 Feb. 1989), ICAO Doc. AN. Min. 120-7; Minutes, ICAO Air Navigation Commission (9 Feb. 1989), ICAO Doc. AN. Min. 120-8 (Exhibit 23). The ANC also concluded that Annex 11, para. 2.15.1.1, of the Chicago Convention (Exhibit 4) should be upgraded to a standard and its text clarified. That paragraph recommends that initial coordination of activities potentially hazardous to civil aircraft should be effected through the ATS authority of the State where the organization planning potentially hazardous activities is located, in the event that that authority is not the appropriate ATS authority for the geographic areas concerned.

[2] Minutes, ICAO Council (13 Mar. 1989), op. cit., Exhibit 19; Minutes, ICAO Council (126th sess., 15 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/19 (Exhibit 20); Minutes, ICAO Council (126th sess., 17 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/20 (Exhibit 21).

On 17 March 1989, after debate in which oral amendments were made to develop an acceptable text, the ICAO Council adopted by consensus the resolution of which Iran complains. The United States voted in favor of this resolution; again no objection was raised regarding the United States' participation in the vote. In the Resolution, the ICAO Council said *inter alia* that it:

> "*Deeply deplores* the tragic incident which occurred as a consequence of events and errors in identification of the aircraft which resulted in the accidental destruction of an Iran Air airliner and the loss of 290 lives;
>
> *Expresses* again its profound sympathy and condolences to the Government of the Islamic Republic of Iran and to the bereaved families;
>
> *Appeals* again urgently to all Contracting States which have not yet done so to ratify, as soon as possible, the Protocol introducing Article 3 *bis* into the Convention on International Civil Aviation;

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[1] Exhibit 21, p. 10.

> Notes the report of the fact-finding investigation instituted by the Secretary General and endorses the conclusions of the Air Navigation Commission on the safety recommendations contained therein;
>
> Urges States to take all necessary measures to safeguard the safety of air navigation, particularly by assuring effective co-ordination of civil and military activities and the proper identification of civil aircraft[1]."

The resolution did not refer to Article 84 of the Chicago Convention, nor did it purport to decide a disagreement between two parties to the Chicago Convention. Once again, at no time during the Council's proceedings on 13-17 March 1989 did any participant, including Iran, refer to Article 84 of the Chicago Convention. Nor was any mention made of the ICAO Rules for the Settlement of Differences, the exclusive basis for bringing Article 84 disputes before the Convention.

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[1] Exhibit 21, p. 11.

CHAPTER IV

IRAN, UNSATISFIED WITH THE RESPONSE OF ICAO AND THE UNITED NATIONS TO THE INCIDENT, FILED SUIT BEFORE THIS COURT ON 17 MAY 1989.

On 17 May 1989, Iran filed its Application with this Court, purportedly seeking jurisdiction based on: (1) an appeal of the 17 March 1989 ICAO Council resolution under Article 84 of the Chicago Convention; and (2) Article 14(1) of the Montreal Convention. Pursuant to the Court's order of 12 June 1990, Iran filed its Memorial on 24 July 1990, which pled an additional basis of jurisdiction under the U.S.-Iran Treaty of Amity. For the reasons stated in the following Parts, the claim advanced by Iran is not sustainable under any of these bases.

PART II

THE COURT HAS AUTHORITY IN THESE PRELIMINARY PROCEEDINGS TO UPHOLD THE OBJECTIONS OF THE UNITED STATES TO THE COURT'S JURISDICTION

Iran is invoking three titles of jurisdiction. They are Article 84 of the Chicago Convention, Article 14(1) of the Montreal Convention, and Article XXI(2) of the 1955 Treaty of Amity between Iran and the United States[1]. Each of these provisions confers on the Court jurisdiction to decide disputes relating to the interpretation and application of the subject convention once certain conditions are satisfied. It is the contention of the United States that in no case are the applicable conditions satisfied, and that the Court has no jurisdiction under any of those conventions. The United States accordingly is requesting that the Court address the issue of jurisdiction first, in accordance with Article 79 of the Rules of Court.

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[1] Iranian Memorial, para. 2.01. The United States notes at the outset that, as Applicant, it is Iran's duty to establish that the Court has jurisdiction and that Iran's Application is otherwise admissible. S. Rosenne, The Law and Practice of the International Court p. 580 (2d ed. 1985) ("Generally, in application of the principle actori incumbit probatio the Court will formally require the party putting forward a claim to establish the elements of fact and of law on which the decision in its favor might be given.") (Exhibit 62). The United States will demonstrate in this submission that Iran cannot meet that burden.

Some of these objections deal with purely procedural prerequisites to suit. Others go only to the question of whether there is a reasonable connection between the convention relied upon by Iran to establish jurisdiction and the claims submitted to the Court. In our view, all of these objections are sustainable on the basis of the facts alleged or admitted by Iran, and on the basis of any reasonable interpretation of the three conventions. Moreover, the Court is authorized to address these objections during this preliminary phase even if they raise issues that touch upon the merits of the case. Paragraph 6 of Article 79 of the Rules of Court authorizes the Court to address all legal and factual questions that bear on the issue of a preliminary objection, even to the extent of adducing evidence on such questions, in order to dispose of that objection. The history of that provision demonstrates that its essential purpose was to facilitate and encourage the Court to dispose of cases at the preliminary objection stage even where to do so may touch upon the merits of the proceeding.

In the early 1970s, in connection with the consideration of proposals to enhance the effectiveness of the Court, representatives in the Sixth Committee of the General Assembly criticized the previous practice of the Court in joining preliminary objections with the merits. The debates in the

Sixth Committee were summarized in 1970 in the analytical report of the Committee to the General Assembly as follows:

> "In particular, the view was expressed that it would be useful for the Court to decide expeditiously on all questions relating to jurisdiction and other preliminary issues which might be raised by the parties. The practice of reserving decisions on such questions pending consideration of the merits of the case had many drawbacks and had been sharply criticized in connexion with the *South West Africa* cases and the *Barcelona Traction* case[1]."

This was repeated the next year and was summarized as follows in the 1971 report of the Committee:

> "Mention was also made of a suggestion that the Court should be encouraged to take a decision on preliminary objections as quickly as possible and to refrain from joining them to the merits unless it was strictly essential[2]."

In 1972, the Rules of Court were revised to encourage rulings on preliminary objections prior to the merits phase. Previously, the Rules expressly authorized the Court to join the objection to the merits. Paragraph 5 of Article 62 of the 1946 Rules had provided:

> After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits.

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[1] Report of the Sixth Committee, UNGA (25th sess., Dec. 1970), U.N. Doc. A/8238, p. 19 (Exhibit 63).

[2] Report of the Sixth Committee, UNGA (26th sess., Dec. 1970), U.N. Doc. A/8568, p. 21 (Exhibit 63).

In 1972, the Rules relating to preliminary objections were revised to eliminate this express authorization and provide instead a rule intended to encourage the disposition of such objections prior to the consideration of the merits, even if this required addressing questions of law or fact that may touch upon the merits. Paragraph 7 of Article 67 of the 1972 Rules, which corresponds to paragraph 7 of Article 79 of the current Rules, provides:

> "After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time limits for further proceedings."

Moreover, the Court added a new provision in Article 6 that provides:

> "In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue."

These revisions have been recognized as introducing one of the most important amendments to the Rules[1].

Prior to these revisions, the Court had felt compelled to join the issue of jurisdiction with the merits where determination of a preliminary objection required consideration of questions of fact or law that may bear a close relationship to some of the issues on the merits of the case. As recognized by one of the principal architects of the revisions, paragraph 6 is intended to provide a different solution to such difficulties:

> "In the presence of such an objection, the Court, instead of bringing in the whole of the merits by means of a joinder, would, according to paragraph 6, request the parties to argue at the preliminary stage those questions, even those touching upon the merits, which bear on the jurisdictional issue. Thus, there would no longer be justification for leaving in suspense or for postponing a decision of the Court's own jurisdiction[2]."

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[1] E. Jimenez de Arechaga, "The Amendments to the Rules of Procedure of the International Court of Justice," 67 A.J.I.L., p. 1, at p. 11 (1973) (Exhibit 64); G. Guyomar, Commentaire du Reglement de la Cour Internationale de Justice - Interpretation et Pratique, p. 371 (1972) (Exhibit 65).

[2] E. Jimenez de Arechaga, op. cit., Exhibit 64, p. 13.

Similarly, Professor Guyomar concluded:

> L'alinéa 6 reconnait à la Cour le droit d'inviter les Parties à débattre tout point de fait ou de droit, et à produire tout moyen de preuve ayant trait à la question de la compétence de la Cour, ceci afin de permettre à cette dernière de se prononcer sur ce point au stage préliminaire de la procédure. L'accent semble donc mis sur la nécessité de statuer sur la compétence avant d'entamer l'examen de l'affaire au fond : c'est là un élément nouveau et vraisemblablement très important[1]."

The United States' objections to Iran's assertion of jurisdiction under the Chicago Convention, the Montreal Convention, and the 1955 Treaty of Amity are the kind of objections which can and should be disposed of under paragraph 6 of Article 79 of the Rules. All of these objections, including in particular the objections that go to the question of whether there is a reasonable connection between these conventions and Iran's claims, address the fundamental issue of the consent of the United States to the institution of these proceedings.

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[1] G. Guyomar, *op. cit.*, Exhibit 65, p. 371. As translated into English, Professor Guyomar concluded: "Paragraph 6 acknowledges the Court's right to invite the Parties to debate any point of fact or law, and to produce any evidence relating to the issue of the Court's jurisdiction in order to allow the Court to rule on this point in the preliminary stage of the procedure. *In this way, the emphasis appears to be placed on the need to rule on the matter of jurisdiction prior to undertaking an examination of the case on its merits. This is a new and seemingly very important element*." (Emphasis added.)

In accordance with Article 36(1) of the Statute, the jurisdiction of the Court under each of the three conventions must rest on the consent of the States concerned[1]. As the Court said in the Peace Treaties case, "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases[2]."

A state cannot, however, be presumed to have consented to jurisdiction simply on the basis of a mere assertion by another state that a particular dispute arises under one of those conventions. As the Court expressly concluded in Ambatielos, "It is not enough for the claimant government to establish a remote connection between the facts of the claim" and the treaty upon which jurisdiction was founded[1]. The claimant government must establish a reasonable connection between the treaty and the claims submitted to the Court[1].

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[1] See Anglo-Iranian Oil Co., Judgment, I.C.J. Reports 1952, p. 93, at p. 103; Ambatielos, Preliminary Objections, Judgment, I.C.J. Reports 1952, p. 28, at p. 38; Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 65, at p. 71.

[2] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 65, at p. 71.

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[1] *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, p. 10, at p. 18. In that case, the question was whether the Court had jurisdiction under a 1926 Treaty of Commerce and Navigation between the United Kingdom and Greece to decide whether the United Kingdom was under an obligation to submit to arbitration a dispute between the two governments as to the validity of the Ambatelios claim in so far as the claim was based on an 1886 Treaty of Commerce and Navigation between the parties. The Court rejected the contention by the United Kingdom that before the Court could decide upon arbitration it was necessary for the Court to determine whether the claim was actually or genuinely based upon the 1886 Treaty, holding that to do so would be to substitute the Court impermissibly for the special commission of arbitration established under the 1886 Treaty. *Ibid.*, pp. 16-17. In the unique circumstances of that case, the Court concluded that it must determine whether the arguments were "sufficiently plausible" to establish a connection between the claim and the 1886 Treaty. *Ibid.*, p. 18. Before concluding that it had the jurisdiction to refer the dispute to the special commission, the Court analyzed the particular claim to determine if it came within the scope of the 1886 treaty. *Ibid.*, pp. 16, 18. For the purposes of that case, the Court concluded that its function was limited to determining simply whether the arguments were of a sufficiently plausible character to warrant a conclusion that the claim at issue was based on the treaty. *Ibid.*, p. 18. A few years later, in a case involving a contract dispute between UNESCO and four former employees, the Court was asked to address a similar question of interpretation regarding the relationship of the contract claims to the provisions of the Statute of the Administrative Tribunal of the International Labour Organization. In that case, the Court concluded that "it is necessary that the complaint should indicate some genuine relationship between the complaint and the provisions invoked" and characterized the issue as "whether the terms and the provisions invoked appear to have a substantial and not merely an artificial connexion with the refusal to renew the contracts." *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 77, at p. 89.

For the purposes of disposing of the United States' objections, the Court may rely on a reasonable interpretation of the three conventions and upon the facts as alleged or admitted by Iran[2]. In accordance with paragraph 6 of Article

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[1] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 392, at p. 427. In that case, the United States objected that a treaty of Friendship, Commerce and Navigation relied upon by Nicaragua to establish jurisdiction in those proceedings was irrelevant to the subject matter of Nicaragua's claims before the Court and, therefore, provided no basis for such jurisdiction. While the Court concluded that the treaty provided a basis for jurisdiction, it did so on the basis of an analysis of Nicaragua's claims in light of the circumstances in which Nicaragua brought its Application to the Court and the facts asserted by Nicaragua. A similar analysis of Iran's claims in light of the circumstances in which Iran brought its Application to the Court and the facts asserted by Iran demonstrate that the Chicago Convention, the Montreal Convention, and the Treaty of Amity do not provide jurisdiction in these proceedings.

[2] To the extent that a factual issue relating to the downing of Iran Air Flight 655 arises incidentally to the disposition of these objections, that issue can be resolved on the basis of the extensive public record of the proceedings of the ICAO on this matter. There is no need for a further examination of the facts of this incident.

79, the Court may and, in the view of the United States, should uphold each of the objections of the United States without proceeding to the merits of this case.

In its Memorial, Iran asserts that the United States has violated international law in a number of respects unrelated to the three conventions upon which it relies to establish the Court's jurisdiction and requests the Court to make findings based upon those violations, without even a pretense of establishing the jurisdiction of the Court to entertain such claims. Iran has not asserted that the jurisdiction of this Court arises under Article 36(2) of the Statute of the Court, nor pursuant to the compromissory clauses of any convention other than the three discussed above. In its Memorial, however, Iran makes various assertions that the United States has violated the United Nations Charter, principles of the Hague Conventions of 1907, and rules of customary international law regarding the use of force, neutrality, sovereignty, non-intervention, and the law of the sea[1]. In the submissions contained in its Memorial, Iran asks the Court to find that by shooting down Iran Air Flight 655 the United States has violated "fundamental principles of international law", and that by stationing and operating warships and aircraft within Iranian territorial sea and internal waters the United States has violated "general and customary international law[1]". The United States denies that its actions have violated any of these conventions, principles, or rules of customary international law. In any event, this Court does not have jurisdiction to determine whether the United States has violated the United Nations Charter, the Hague Conventions, or the rules of customary international law, and must accordingly disregard these allegations.

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[1] Iranian Memorial, pp. 2-3.

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[1] Iranian Memorial, Fourth and Ninth Submissions.

Iran also states, and requests this Court to find, that the action of the United States on 3 July 1988, is an "international crime[1]". The United States strongly protests the assertion of this baseless claim. This Court was not established as a criminal court and States have never consented to its operation as such. Since the Court is without jurisdiction to make such a finding, those parts of the Iranian case based on "criminal" allegations must be immediately dismissed.

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[1] Iranian Memorial, para. 1.03; Sixth and Eleventh Submissions.

PART III

THE COURT DOES NOT HAVE JURISDICTION UNDER ARTICLE 84 OF THE CHICAGO CONVENTION ON INTERNATIONAL CIVIL AVIATION

In its Application and its Memorial, Iran asserts that the Court has jurisdiction on the basis of Article 84 of the Chicago Convention[1], in the guise of an appeal from a 17 March 1989 decision of the ICAO Council. These assertions are completely without foundation in fact and in law. The clear and unambiguous record of the deliberations in the ICAO Council -- including Iran's own statements before the Council -- establishes beyond question that the Council was never seised of a disagreement between Iran and the United States pursuant to Article 84 of the Convention. Instead, all of the Council's actions were taken pursuant to Articles 54 and 55 of the Convention, provisions under which most of the Council's business is conducted. In all such cases, decisions of the Council are final and not subject to appeal to this Court.

Iran has utterly ignored the Council's broad mandate under articles of the Chicago Convention other than Article 84 to examine matters that may involve the application or interpretation of the Convention. Indeed, Iran's pleadings would leave the impression that any ICAO Council decision that bears on the application or interpretation of the Chicago Convention is, perforce, a decision under Article 84. On the contrary, such issues are rarely dealt with under the quasi-judicial procedures of Article 84, and when the Council has resorted to Article 84 it has always made clear that it was doing so.

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[1] The Chicago Convention appears at Exhibit 1.

ICAO many years ago adopted comprehensive, exclusive, and mandatory rules and procedures for the handling of Article 84 disputes. The record of the relevant Council deliberations establishes beyond doubt that Iran never invoked Article 84 or those exclusive procedures. The Council's deliberations did not address a disagreement relating to the interpretation or application of the Chicago Convention between Iran and the United States. Instead, the Council carried out its essential responsibility to take measures to ensure the safety of civil aviation. It follows that the proceedings of the Council do not -- and were never intended to -- form a basis for any review by this Court within the scope of Article 84.

Having attempted to rewrite history to recharacterize the Council's deliberations as Article 84 proceedings, Iran asks this Court to overturn and disregard those long-established rules developed by ICAO and the Contracting States to the Chicago Convention that enable the Council to perform its quasi-judicial functions under Article 84. Such a ruling would threaten the institutional integrity and proper functioning of ICAO by making subject to appeal a broad range of Council decisions taken under articles other than Article 84. The United States submits that the respect due a coordinate body of the United Nations obliges the Court to reject Iran's assertion.

Moreover, by asking the Court to hear an appeal where no Article 84 proceeding ever occurred before the Council, Iran asks for this Court to act as a court of first instance, rather than as a court of appeals. As Article 84 permits this Court to act only as a court of appeals, Iran's argument must be rejected[1].

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[1] For purposes of clarity, the United States in this part focuses its argument on the fact that the 17 March 1989 ICAO Council resolution about which Iran complains was not a decision of the ICAO Council pursuant to Article 84 of the Chicago Convention. As Iran has failed to satisfy this basic requirement, the United States does not in this pleading raise other arguments which might be regarded as fundamental in character. For example, the Chicago Convention, including Article 84 thereof, does not regulate in any way the conduct of surface vessels engaged in active combat. Exhibit 1, Arts. 89 and 3. The United States reserves the right to adduce these arguments, if necessary, at a subsequent point in these proceedings.

CHAPTER I

THE CHICAGO CONVENTION AND THE ICAO RULES CLEARLY DISTINGUISH BETWEEN THE ICAO COUNCIL'S QUASI-JUDICIAL FUNCTIONS UNDER ARTICLE 84 (FOR WHICH THERE IS A POSSIBILITY OF APPEAL TO THE COURT) AND ITS FUNCTIONS UNDER OTHER ARTICLES REGARDING THE IMPLEMENTATION OF THE CONVENTION (FOR WHICH NO REVIEW BY THE COURT IS PROVIDED).

In examining Iran's treatment of the Chicago Convention issues, the United States is struck by the omission from the Iranian Application and Memorial of basic and fundamental information concerning the operation of ICAO. Although Iran's Memorial often cites legal commentaries on dispute resolution in ICAO, it fails to mention the fundamental observation in these commentaries that the Convention envisages two distinct and mutually exclusive methods under which the ICAO Council may examine matters involving the Convention.

On the one hand, the ICAO Council is a principal policy organ of the Organization and is called upon to deal with a broad range of aviation matters. These will necessarily include, from time to time, matters that raise issues concerning the application or interpretation of the Chicago Convention. On the other hand, on truly rare occasions, the Council is called upon, under Article 84, to act as a quasi-judicial dispute-settlement organ. Article 84 states:

> "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by

> the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council."

As described in greater detail below, to enable it to carry out this function, ICAO many years ago developed particular Rules for the Settlement of Differences[1]. Those rules are detailed, comprehensive, exclusive, and mandatory in all instances in which the Council acts under Article 84 of the Convention.

Absent from Iran's lengthy Memorial is any mention of the distinction between the Council's quasi-judicial functions under Article 84 and its functions under other articles. Even more conspicuous is the absence of any reference to the Council's Rules for the Settlement of Differences. By ignoring these fundamental facts, Iran would attempt to mislead this Court into believing that the Council was acting under Article 84 in its consideration of the 3 July 1988 incident and, thus, into a manifestly erroneous application of the Court's jurisdiction under Article 84.

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[1] Rules for the Settlement of Differences, ICAO Doc. 7782/2 (1975) (hereinafter the "Rules"). The official ICAO versions of the Rules, in the English, French, Spanish, and Russian languages, appear at Exhibit 6.

Section I. The ICAO Council, Acting Under Articles of the Chicago Convention Other Than Article 84, Has the Power and Obligation to Deal with a Broad Range of Potentially Contentious Aviation Matters Involving the Application of the Convention, Without Possibility of Review by the Court.

In addition to being a multilateral agreement that prescribes general rules for international civil aviation, the Chicago Convention created[1] and established the charter of the International Civil Aviation Organization (ICAO). The Convention established two principal policy organs of ICAO, the Assembly and the Council. The Assembly, which is composed of representatives of all Contracting States, "shall meet not less than once in three years and shall be convened by the Council at a suitable time and place[2]." As provided in Article 50(a), the Council is a permanent body which is "responsible to the Assembly" and is composed of thirty-three Contracting States elected by the Assembly.

As provided in Articles 54 and 55, the scope of the Council's functions is broad. Article 54 prescribes 14 mandatory functions of the Council. Among other things, the Council is obliged to report to Contracting States any infraction of the Convention or failure of a Contracting State to carry out Council recommendations or determinations[1]; to report to the Assembly any infraction of the Convention in which a Contracting State has failed to take appropriate action[2]; to adopt international standards and recommended practices dealing with air navigation and other matters[3]; to consider recommendations of the Air Navigation Commission for amendment of standards and recommended practices[4]; and, most relevant in light of its discussions in the Iran Air matter, to "[c]onsider any matter relating to the Convention which any Contracting State refers to it[5]."

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[1] Exhibit 1, Art. 43.

[2] Exhibit 1, Art. 48.

Permissive functions of the Council are set forth in Article 55 and are also broad. They include the right to "[c]onduct research into all aspects of air transport and air navigation" of international importance[6] and to

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[1] Exhibit 1, Art. 54(j).

[2] Exhibit 1, Art. 54(k).

[3] Exhibit 1, Art. 54(l).

[4] Exhibit 1, Art. 54(m).

[5] Exhibit 1, Art. 54(n).

[6] Exhibit 1, Art. 55(c).

"[i]nvestigate, at the request of any Contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation[1]." In light of the authorities granted to it under the Chicago Convention, the ICAO Council enjoys a broad mandate to deal with a wide range of issues involving international civil aviation. Because of the breadth and overlapping nature of the functions set forth in Articles 54 and 55, Council actions typically engage several of its enumerated powers under those Articles. It is manifest that in carrying out its multitude of functions under Articles 54 and 55, the Council will be called upon to consider many kinds of contentious issues. Those issues will frequently involve questions concerning, among other things, the interpretation or application of the Chicago Convention.

The practice of the Organization, moreover, indicates that Council discussions concerning the application or interpretation of the Convention are undertaken routinely outside the framework of Article 84. In its 132 sessions since its creation, the ICAO Council has convened over a thousand meetings and rendered many thousands of decisions of various kinds. In contrast, over that period the Council has been called upon only three times to exercise its Article 84 powers[1]. Not surprisingly, absent a specific invocation of Article 84 procedures by a Contracting State, the Council would have no basis to believe that it was deciding a dispute under Article 84.

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[1] Exhibit 1, Art. 55(e)

In operation, Articles 54 and 55 of the Chicago Convention give the ICAO Council wide latitude to address issues relating to the interpretation or application of the Convention. In one well-known instance in 1956, the Government of Czechoslovakia charged before the Council that the United States had launched leaflet-carrying balloons into Czechoslovakian airspace[2]. In its charges against the United States in the ICAO Council. Czechoslovakia claimed violations of Articles 1 and 8 of the Chicago Convention and asked the Council under Article 54(j) and 55(e) to take effective steps against the release of the balloons[1]. Although the issue brought by Czechoslovakia entailed both the interpretation and application of the Convention, it was not an Article 84 disagreement[2].

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[1] M. Milde, "Dispute Settlement in the Framework of the International Civil Aviation Organization", *Settlement of Space Law Disputes*, p. 87, at p. 90 (1980) (Exhibit 66); N.M. Matte, *Treatise on Air-Aeronautical Law*, pp. 205-207 (1981) (Exhibit 67); R. Gariepy and D. Botsford, "The Effectiveness of the International Civil Aviation Organization's Adjudicatory Machinery", 42 *Journal of Air Law and Commerce*, p. 351, at p. 357 (1976) (Exhibit 68); ICAO, *Repertory - Guide to the Convention on International Civil Aviation*, ICAO Doc. 8900/2, Art. 84, pp. 1-4 (2nd ed. 1977) (Exhibit 69); *see* T. Buergenthal, *Law-Making in the International Civil Aviation Organization*, p. 123 (1969) (Exhibit 70).

[2] For a more detailed discussion of the ICAO Council discussions of the weather balloon matter, *see* T. Buergenthal, *op. cit.*, Exhibit 70, pp. 131-36.

More recent examples of matters that involved the application of the Chicago Convention and that were not handled under Article 84 include requests for ICAO Council action involving Israel's 1973 downing of a Libyan airliner over the Sinai and the Soviet Union's 1983 downing of Korean Air Lines

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[1] T. Buergenthal, op. cit., Exhibit 70, p. 133.

[2] Professor Thomas Buergenthal has noted that "the ICAO Council did not regard the Czech complaint against the U.S. as an application for adjudication under Article 84 of the Convention because Czechoslovakia had not invoked that provision. . . ." T. Buergenthal, op. cit., Exhibit 70, p. 135

Flight 007[1]. In both instances, the Council addressed shootdowns of civil aircraft under its Article 54 and 55 authority[2]. In both, the Council addressed allegations that the state in question had violated provisions of the Chicago Convention. In neither instance did the Council consider and decide those matters under Article 84[1]. In neither instance did any of the parties involved attempt to appeal the Council's decision to the Court or suggest that there was any option to do so.

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[1] ICAO's summary of the ICAO Council's handling of the Libyan airliner shootdown appears in Action of the ICAO Council, ICAO Doc. 9079 (78th sess., Jan. - Mar. 1973), pp. 11-13 (Exhibit 44); Action of the ICAO Council (79th sess., May - June 1973), ICAO Doc. 9097, pp. 30-34 (Exhibit 46). ICAO's summary of the ICAO Council's handling of the Korean Air Lines shootdown appears in Action of the Council (110th and extra. sess., Sep., Oct. - Dec. 1983), ICAO Doc. 9428, pp. 20-28 (Exhibit 57); and Action of the Council (111th sess., Feb. - Mar. 1984), ICAO Doc. 9442, pp. 9-11 (Exhibit 59).

[2] As reflected in the ICAO Record of its Action in its 78th Session, the ICAO Investigation of the Libyan airliner was ordered by the Council pursuant to Article 54(b). Exhibit 44, p. 12. Similarly, as reflected in the Council minutes, Council consideration of the Soviet shootdown of the Korean airliner began at an extraordinary session on 15 and 16 September 1983, which, pursuant to Article 55(e), requested that the Secretary General prepare a fact-finding report. Minutes, ICAO Council (111th sess., Feb.- Mar. 1984), ICAO Doc. 9441, pp. 85, 90, and 102 (Exhibit 58). Subsequent ICAO Council action on the Korean airliner incident, including the Council's 5 March 1984 resolution that, inter alia, condemned the Soviet Union, was taken under the Council's mandate to consider that report. Exhibit 59, pp. 9-11.

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[1] In the Council deliberations of 4 June 1973, the Israeli observer

> ". . . questioned the right of Egypt and Lebanon, under Article 53 of the Convention, to vote on the resolution. When the Director of the Legal Bureau expressed the opinion that this Article was linked with Article 84 and that sponsorship of the resolution did not make Egypt and Lebanon parties to a 'dispute', he (the Representative of Israel) rejoined that the difference of opinion between these two States and Israel on the interpretation of the report now before the Council was a dispute within the meaning of Article 53. He did not press the point after the President indicated that the term "dispute" within Article 53 had always been interpreted as a dispute within the meaning of Article 84. . . ."

Minutes, ICAO Council (79th sess., May - June 1973, closed), ICAO Doc 9073, p. 27 (Exhibit 47). In rejecting the Israeli suggestion, the President of the Council alluded to the strict distinction in the Chicago Convention between Council deliberations under Article 84 and Articles 54 and 55. The President specifically noted that "if every difference of opinion between States on matters coming within the orbit of the Convention was considered a 'dispute', the Council would have no time for other business." *Id.*, p. 56. As noted above, the Israeli observer did not press the point precisely because all participants recognized that the Council discussion was not being conducted pursuant to Article 84.

The Chicago Convention provides that only disputes that satisfy the requirements of Article 84 may be subject to appeal to the International Court of Justice. The Convention does not permit decisions taken pursuant to Articles 54 and 55 to be appealed to the Court, and the Court has no jurisdiction under Article 84 to consider such "appeals".

Section II. In Carrying out Its Article 84 Functions, ICAO Has Developed Detailed Rules for the Settlement of Differences, Which Are the Exclusive Basis for Bringing Article 84 Disputes Before the Council.

In addition to carrying out the policy functions described in Articles 54 and 55 of the Convention, the Council, under Article 84, may be called upon to act as a quasi-judicial body in the formal resolution of disputes between Contracting States involving the interpretation or application of the Convention which are referred to it under that Article. In carrying out its functions under Article 84, the ICAO Council is called upon to function very differently than when it conducts policy deliberations under Articles 54 and 55. As explained by Professor Bin Cheng:

> "In such an event [when the Council resolves disputes under Article 84], the Council must consider itself an international judicial organ and act in accordance with

> rules of international law governing judicial proceedings. Thus, *inter alia*, members of the Council, even though they may be national representatives nominated by Governments must, when functioning under Chapter XVIII of the Chicago Convention, 1944, act in an impartial and judicial capacity[1]."

Confronted with this obligation under Article 84 to function as "an international judicial organ [acting] in accordance with rules of international law governing judicial proceedings", the Council realized many years ago that its ordinary procedures were inadequate and that special procedures -- to be employed only under that Article -- were needed. Thus, in 1952, when India brought a formal complaint in the Council against Pakistan for alleged violations of the Chicago Convention, the Council, acting under its Article 54(c) authority to "[d]etermine its organization and rules of procedure[2]", adopted provisional rules of procedure governing the discharge of its functions under Article 84 and established a working group to review and improve those rules[1]. The Council provisionally adopted the rules in 1953. After receiving comments from Contracting States to the Chicago Convention, the Council promulgated final Rules for the Settlement of Differences (hereinafter referred to as the "Rules") on 9 April 1957[2].

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[1] Bin Cheng, The Law of International Air Transport, pp. 100-101 (1962) (citations omitted) (Exhibit 71).

[2] In Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, at p. 74, Judge Lachs noted that "Within the powers thus vested in it [under Article 54(c) of the Convention] the Council approved, on 9 April 1957, the 'Rules for the Settlement of Differences'. . . ."

The Rules are the exclusive basis for bringing Article 84 disputes. Paragraph 1 of Article 1 of the Rules states in pertinent part:

> "The Rules of Parts I and III [of these Rules] shall govern the settlement of the following disagreements between Contracting States which may be referred to the Council:
>
> (a) *Any* disagreement between two or more Contracting States relating to the interpretation or application of the Convention on International

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[1] T. Buergenthal, *op. cit.*, Exhibit 70, p. 180. An excellent description of the Rules appears in R.H. Mankiewicz, "Pouvoir Judiciare du Conseil et Reglement pour la Solution des Differends", 3 *Annuaire Francais de Droit International*, pp. 383-404 (1957) (Exhibit 72, with English translation).

[2] T. Buergenthal, *op. cit.*, Exhibit 70, p. 183. Since November 1975, when the Rules were amended in minor respects, the Rules have remained unchanged.

> Civil Aviation . . . and its Annexes (Articles 84 to 88 of the Convention) . . . ."

(Emphasis added.) Thus, the Rules make clear at their outset that any disagreement which is to be decided under Article 84 of the Convention must be submitted to the Council and decided in accordance with the Rules. Other articles of the Rules also emphasize the mandatory nature of the Rules. Thus, under Article 2, any State submitting a disagreement to the Council under Article 84 "shall" file an application. In this way, the Rules put States on notice of what types of submissions will constitute an "application" under Article 84.

In carrying out the requirements of the Rules, parties and the ICAO Council create a clear documentary record which establishes whether a disagreement relating to the interpretation or application of the Convention has in fact been decided by the Council. The Rules place a heavy emphasis on written proceedings[1]. For example, Article 2 of the Rules provides:

> "Any Contracting State submitting a disagreement to the Council for settlement (hereinafter referred to as "the applicant") shall file an application to which shall be attached a memorial containing:

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[1] See T. Buergenthal, op. cit., Exhibit 70, p. 189.

> (a) The name of the applicant and the name of any Contracting State with which the disagreement exists (the latter hereinafter referred to as "the respondent");
>
> (b) The name of an agent authorized to act for the applicant in the proceedings, together with his address, at the seat of the Organization, to which all communications relating to the case, including notice of the date of any meeting, should be sent;
>
> (c) A statement of relevant facts;
>
> (d) Supporting data related to the facts;
>
> (e) A statement of law;
>
> (f) The relief desired by action of Council on the specific points submitted;
>
> (g) A statement that negotiations to settle the disagreement had taken place between the parties but were not successful."

Articles 5 and 6 set forth rules for a respondent State's submission of a counter-memorial and preliminary objections. In each instance, such responses must be in writing.

Other provisions reinforce the Rules' emphasis on the development of a written record. Thus, under Article 9, parties that wish to produce information in addition to that contained in their written pleadings (including testimony of witnesses and experts) are required to submit that evidence in writing, absent a Council order to the contrary. Similarly, Article 12(2) provides that final arguments, absent a Council order to the contrary, must be presented in writing, and Article 15(2) states that "[t]he decision of the Council shall be in writing".

The Rules impose clear and distinctive procedural requirements on the Council. Just as the Rules instruct parties how they may bring and defend a proceeding before the ICAO Council under Article 84, the Rules establish requirements of comparable formality on the Council and other ICAO organs. Thus, upon receipt of an application instituting proceedings in the Council under Article 84 of the Convention, Article 3 requires the ICAO Secretary General to verify compliance with Article 2 of the Rules by the applicant State; to notify all parties to the Convention and all members of the Council that an application has been received; and to forward the application and its supporting documentation to the respondent State, inviting the respondent State to submit a counter-memorial within a time limit fixed by the Council.

Chapter IV (Articles 7 through 20) of the Rules establishes extensive additional procedural requirements that govern Article 84 proceedings. These include matters such as the filing of additional pleadings (Article 7); the production of evidence (Article 9); and questions during oral argument (Article 11). Similarly, Article 15 establishes detailed requirements for Council decisions.

Section III. The ICAO Rules Provide Essential Protections to Contracting States and to ICAO as an Organization.

It is not by accident that the Rules are formulated as they are. Indeed, as noted above, the Rules represent many years of careful work and review by jurists, the ICAO Council, and the Contracting States. The Rules serve three important functions which protect both the parties to an Article 84 proceeding and the institutional integrity of the ICAO Council.

First, the Rules ensure that the parties to a dispute will enjoy essential and fair notice of the proceeding, an opportunity to present legal arguments and factual evidence, and a reasoned and written decision by the ICAO Council.

Second, the Rules ensure the creation of a proper quasi-judicial record, which would enable the Court or a reviewing arbitral tribunal to evaluate the decision made by the Council without necessarily being required to speculate about what the arguments of the disputants or the rationale of the Council might have been. In this way, the Rules preserve the clear intent of Article 84 that the ICAO Council be the forum of first instance in resolving disagreements relating to the interpretation or application of the Convention.

Finally, the Rules safeguard the proper functioning of the ICAO Council and, ultimately, of ICAO itself. As has been noted above, the ordinary function of the ICAO Council is that of a policy body, which enjoys a broad mandate to examine and deal with a wide array of matters involving international civil aviation and the Chicago Convention. In contrast, under Article 84, the Council is called upon to exercise an extraordinary and far different function, as a quasi-judicial body. Not only do the Rules instruct the Council how it shall act once proceedings under Article 84 are initiated by recourse to the Rules, but the exclusive nature of the Rules gives the Council and all concerned parties fair notice that they are being called upon to take part in a quasi-judicial proceeding. Absent recourse to those procedures, the ICAO Council acts only under Articles 54 or 55. While such actions could conceivably be subject to some form of scrutiny by the ICAO Assembly, the Chicago Convention does not provide for their review by this Court.

In light of the clear structure of, and practice under, the Chicago Convention, a Contracting State that believes that a disagreement concerning the interpretation or application of the Convention exists between it and another Contracting State may pursue one of two mutually exclusive courses of action.

First, should it wish to have the matter decided under the dispute-resolution mechanisms of Article 84, it may submit an application and memorial as provided for under the Rules, and subsequently participate in ICAO Council proceedings under those Rules. In such a case, a lengthy and particularized documentary record will be created, while both the ICAO Council and the respondent State will understand that dispute settlement under Article 84 provisions have been invoked.

In the alternative, should a Contracting State for whatever reason not wish to invoke Article 84, it may call upon the Council to act otherwise with respect to matters relating to the Convention, a request which the Council would consider under Articles 54 and 55. What a State may not do, consistent with the Convention, is choose one course of action and later, dissatisfied with the result, claim that it had pursued the other course all along.

As the analysis below will establish, in its request for ICAO discussion of the Iran Air incident and its subsequent actions at ICAO relating to the incident, Iran chose not to bring a dispute under Article 84. Instead, the Council, the United States, and all participants in those Council sessions properly believed that the Council was acting under Article 54 and 55, and was not deciding an Article 84 dispute. The historical record of those discussions -- including the complete absence of any reference to, or application of, Article 84 or the Rules for the Settlement of Differences -- irrefutably supports this conclusion.

CHAPTER II

THE 17 MARCH 1989 RESOLUTION OF THE ICAO COUNCIL WAS NOT A DECISION OF THE COUNCIL WITHIN THE MEANING OF ARTICLE 84 OF THE CHICAGO CONVENTION.

Section I. Iran Did Not Invoke or Otherwise Rely on Article 84 of the Convention in Bringing the Incident of 3 July 1988 Before the ICAO Council.

As described in Part I, Iran brought the incident of 3 July 1988 to the attention of the ICAO Council for the first time in two 3 July 1988 telexes[1]. In neither of those communications, nor in its 4 July 1988 telex which requested a meeting of the Council, nor in its subsequent written and oral communications to the Council did Iran seek to invoke, or even refer in any way, directly or indirectly, to Article 84, the Rules, or the Council's dispute settlement functions thereunder.

Iran's 4 July communication is particularly revealing, as it informed Council President Kotaite of its view that "this grave matter [should] be tabled in the ICAO Council as a matter of urgency with the view that an extraordinary session of the ICAO Assembly be urgently convened to conduct a thorough investigation of all aspects of the catastrophe[1]." This request could not have been for adjudication of a dispute under Article 84, as the Assembly has no function whatsoever under that Article. Equally significant, the ICAO Council had no reason at all to believe, based on the Iranian communication of 4 July, that Iran was seeking to invoke Article 84 procedures.

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[1] The Iranian telexes of July 3 and 4 appear as attachments to Exhibit 10.

Nowhere in Iran's subsequent submissions to the Council is there any suggestion that the Council was being called upon to decide a dispute under Article 84. Similarly, the exhaustive records of the ICAO Council meetings of 13 and 14 July 1988, 5 and 7 December 1988, and 13, 15, and 17 March 1989 show beyond refutation that Iran consistently failed to characterize the

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[1] Exhibit 19.

Council's deliberations as proceedings under Article 84[1]. It is indeed unbelievable that a State that wished to invoke the long-established dispute settlement machinery of Article 84 of the Convention would remain utterly silent on such a fundamental point throughout the relevant Council deliberations.

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[1] In the voluminous minutes of the Council sessions of 13 and 14 July 1988, 5, 7, and 14 December 1988, and 13, 15, and 17 March 1989, Iran can point to no instance in which any party referred to Article 84 or stated that the Council was being called upon to decide a disagreement under that provision. See Minutes, ICAO Council (extra. sess., 13 July 1988), ICAO Doc. DRAFT C-Min. EXTRAORDINARY (1988)/1 (Exhibit 13); Minutes, ICAO Council (extra. sess., 14 July 1988), ICAO Doc. DRAFT C-Min. EXTRAORDINARY (1988)/2 (Exhibit 14); Minutes, ICAO Council (125th sess., 5 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/12 (Exhibit 15); Minutes, ICAO Council (125th sess., 7 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/13 (Exhibit 16); Minutes, ICAO Council (125th sess., 7 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/14 (Exhibit 17); Minutes, ICAO Council (125th sess., 14 Dec. 1988), ICAO Doc. DRAFT C-Min. 125/18 (Exhibit 18); Minutes, ICAO Council (126th sess., 13 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/18 (Exhibit 19); Minutes, ICAO Council (126th sess., 15 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/19 (Exhibit 20); Minutes, ICAO Council (126th sess., 17 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/20 (Exhibit 21). Nor do the "working papers" that were submitted for the Council's information refer to such a dispute nor examine which particular provisions of the Chicago Convention might have been violated by the United States.

Section II. Throughout the ICAO Council Proceedings, Neither Iran nor the ICAO Council Acted Under the Longstanding and Exclusive Procedures Prescribed for the Consideration and Decision of Disputes Under Article 84 of the Convention.

As described previously, the dispute settlement machinery established by the ICAO Council to enable it to exercise its functions under Article 84 is noteworthy for its highly specific, formal, written, and quasi-judicial character. Nowhere in its lengthy Memorial to this Court does Iran provide evidence that the Council discussions even mentioned Article 84 or the Rules, much less followed those procedures. Iran does not because it cannot. The unquestionable fact that neither Iran nor the Council acted under well-settled requirements shows that the Council's consideration did not take place, nor was it thought to have taken place, under Article 84 of the Convention.

A written record, which surely would have existed had an Article 84 dispute been before the Council, does not exist. In light of the requirements in the Rules for written pleadings, evidentiary submissions, Council decisions, and written communications by the ICAO Secretary General, had the Council decided a disagreement under Article 84, a significant written record would have been created. Even the most cursory review of the record of the Council's discussions of the incident of 3 July 1988 establishes beyond doubt that no such documentary record exists.

Thus, as would otherwise have been the case under the express requirements of Article 2 of the Rules, Iran did not file a written application to the Council. Nor did it file a written memorial. Also absent from the record is any Iranian statement of law, a written description of the relief desired on the specific points submitted, or a statement by Iran that negotiations to settle the disagreement had taken place between the parties but were unsuccessful[1]. In the face of this irrefutable evidence, Iran's assertions in its Memorial that it filed an application to the Council[2] and that the Council, acting under Article 84, had "a full file before it" are inexact and deliberately misleading[1].

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[1] Indeed, the only piece of written documentation presented by Iran that appears to refer at all to possible violations of the Chicago Convention was a "working paper" submitted by Iran, which was titled "BACKGROUND INFORMATION." That paper did not refer to Article 84 of the Chicago Convention or the ICAO Rules or characterize itself as an "application", instead focussing on purported violations of international law by the United States that would have occurred prior to 3 July 1988. Working Paper, ICAO Council (extra. sess., July 1988), ICAO Doc. C-WP/8644 (Exhibit 11).

[2] Iranian Memorial, paragraph 2.53.

Absent any act by Iran to commence Article 84 procedures, it is not surprising that no such documentary record exists. Contrary to what would have been the case had the Council been acting pursuant to Article 84, the Secretary General was not called upon to fulfill his responsibilities under Article 3 of the Rules to a) verify that any such application complied with the requirements of Article 2; b) immediately notify all parties to the Convention and members of the Council that the interpretation or application of the Convention was in question; and c) forward copies of the application and supporting documentation to the respondent, with an invitation to file a counter-memorial within a time limit specified by the Council.

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[1] Iranian Memorial, paragraph 2.54. The discussion in the Iranian Memorial is indicative of Iran's selective and misleading handling of the Chicago Convention jurisdictional argument. Indeed, the Council decision was a "final" decision, in the same respect that a great number of Article 54 decisions may have concluded the Council's examination of a particular subject. So too, the Council members had read many papers when they adopted the 17 March 1989 resolution. These were, however, the type of working papers and technical reports on which the Council relies on a daily basis to conduct its daily business. What the Government of Iran cannot establish is that any of those documents that were before the Council on 17 March 1989 were of the type that would have existed had the Council been deciding a formal quasi-judicial dispute under Article 84 of the Chicago Convention.

Additional pleadings -- such as a United States counter-memorial or preliminary objections, an Iranian reply thereto, or a subsequent rejoinder by the United States -- are also absent from the record. Other written submissions envisioned under the ICAO Rules similarly do not exist. Thus, written evidence of experts was not submitted pursuant to Article 9 of the Rules, declarations by witnesses and experts were not submitted pursuant to Article 10, and final written arguments were never presented to the Council, as called for in Article 12. This total absence of a written record eloquently establishes that the ICAO Council was never called upon to adjudicate an Article 84 dispute.

The deliberations of the Council further indicate that the matter was not brought as an Article 84 dispute. As noted in Part I above, the Council addressed the incident of 3 July 1988 in meetings held on 13 and 14 July 1988, 5, 7, and 14 December 1988, and 13, 15, and 17 March 1989. The lengthy documentary record of those meetings is completely devoid of any reference to Article 84, much less of any evidence that the Council believed that it was charged with resolving a dispute under that Article. Indeed, the documentary record of those sessions, as memorialized in the official ICAO Minutes, establishes beyond doubt that the Council addressed this matter under its Article 54 and 55 authorities and not under Article 84.

The minutes of the Council meeting of 13 July 1988 -- at which the Council first addressed the Iran Air incident and which began the process that culminated in the Council resolution of 17 March 1989 -- indicate clearly that the Council was not acting under Article 84. In the words of the President of the Council, in introducing that agenda item to the Council:

> "The imperative task for the Council now is to collect all vital information and to reach a complete technical understanding of the chain of events which led to this tragedy. We have to explore every element of our international regulations in the ICAO Standards, Recommended Practices, guidance material and procedures which could prevent a repetition of a similar tragedy, not only in the area where this tragic incident occurred but anywhere else in the world. And most of all, we have to appeal to all States not to compromise the safety of civil air navigation by any acts and for any reason whatsoever. We have to look ahead and take every technical preventive action possible in the field of safety of air navigation to make sure that similar tragedies will never occur again[1]."

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[1] Exhibit 13, p. 4.

No one, not even Iran, challenged or sought to challenge this characterization of what the Council intended in its consideration of the incident of 3 July 1988. No one, not even Iran, rose to state that the Council had before it a disagreement governed by Article 84. Had Iran wished a different result, the proper course would have been for Iran to initiate proceedings under Article 84 in the manner prescribed by the Rules. Iran should not now be relieved of the consequences of its failure to do so.

Far from asking the ICAO Council to act under Article 84, Iran specifically requested that the Council act under Article 54(j) of the Chicago Convention. The official ICAO minutes from the Council's 7 December 1988 meeting record the following statement of the Iranian observer:

> "Bearing in mind that this incident has a legal aspect, we expect that this aspect of the matter will be examined together with the ANC's [the ICAO Air Navigation Commission's] consideration of the technical aspects of the incident. We also wish to draw the attention of the Council to paragraph j) of Article 54 of the Chicago Convention, which clearly states that the Council should report to Contracting States any infractions of the Convention on International Civil Aviation, as well as any failure to carry out recommendations or determinations of the Council[1]."

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[1] Exhibit 16, p. 19.

To assist the ICAO Council's action under Article 54(j) of the Chicago Convention, Iran noted its "expect[ation]" that the ICAO Legal Bureau would examine the expert's report "to identify infringement [sic] of legal principles which have been committed[1]."

The President of the Council's response to the above Iranian intervention, moreover, further indicates that the Council was acting under Article 54, and was not engaged in quasi-judicial deliberations that might have eventually led to a decision of a disagreement under Article 84:

> "With reference to the observation of the Observer of the Islamic Republic of Iran, regarding Article 54 j) of the Convention on International Civil Aviation . . . the President explained that, as in the past when the subordinate bodies had considered questions relating to the high seas, territorial waters and sovereignty in the airspace, the ANC would be free to consult the Legal Bureau if a legal opinion, or interpretation, was required on the subject under consideration. He also drew attention to Article 54 k), requiring that the Council 'Report to the Assembly any infraction of this Convention where a contracting State has failed to take appropriate action within a reasonable time after notice of the infraction;' and indicated that any

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[1] Exhibit 16, p. 19.

> decision taken on this matter would be reported to the next ordinary session of the Assembly through the medium of the Annual Report of the Council to the Assembly[1]."

This statement is particularly significant, as the Council President stated in clear terms that the final Council resolution of the 3 July 1988 incident would be taken under Article 54, rather than Article 84. That decision was rendered at the next session of the Council, on 17 March 1989, in the form of the Council resolution of which Iran now complains.

Other evidence from the Council meetings further supports this conclusion. For example, although Iran used the July 1988 Council meetings to excoriate the United States, the principal focus of that session was to order a "fact-finding investigation to determine all relevant facts and technical aspects of the chain of events relating to the flight and destruction of the [Iran Air] aircraft[2]." There are two possible authorities under which the Council could have commissioned such an investigation. Were the Council to order an investigation under its ordinary functions, it could do so under Article 55(e) of the Convention[1]. In instances in which the Council would order an investigation in an Article 84 proceeding, it would do so under Article 8 of the Rules[2].

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[1] Exhibit 17, p. 20. (Emphasis added.)

[2] This is the precise mandate of the ICAO investigation team, as memorialized in the ICAO Council decision of 14 July 1988. Exhibit 14, pp. 9-12.

The record of the discussions from 13 and 14 July indicates clearly that the Council acted pursuant to Chicago Convention Article 55(e) and not Article 8 of the Rules. On 13 and 14 July, Council Representatives from Canada and Spain stated their belief that the Council should convene an investigation under Article 55[1]. No participant at that meeting, including the Observer of Iran, contested this characterization.

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[1] Chicago Convention Article 55(e) empowers the Council to "[i]nvestigate, at the request of any Contracting State, any situation which may appear to present avoidable obstacles to the development of air navigation . . . ."

[2] Article 8 of the Rules provides that the Council, after hearing the parties to an Article 84 disagreement, may select "any individual, body, bureau, commission, or other organization" to conduct an inquiry or render an expert opinion.

Just as the Council did not order the investigation under its Article 84 authority, the record of its proceedings is totally devoid of any other evidence that any of its decisions or actions were taken pursuant to the distinctive and exclusive procedures of the Rules. Thus, the Council never discussed whether to appoint a Committee of five Council members to conduct a preliminary examination of the matter[2], nor were the distinctive procedures under Articles 7 through 20 of the Rules ever discussed or followed.

The complete absence of any actions under the Rules by Iran, the United States, or the Council indicates, as a matter of substance and evidence, that no one considered the Council to be acting under Article 84. Consequently, the Council resolution of 17 March 1989 cannot be a "decision" within the meaning of Article 84, and no appeal from that resolution may be taken to the Court under that Article.

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[1] At the 13 July 1988 Council meeting, the representative from Canada stated explicitly that "[i]n the view of my government, the first requirement is that, pursuant to Article 55(e) of the Chicago Convention, there should be a thorough, impartial and expeditious fact finding investigation by ICAO into all relevant circumstances surrounding the destruction of the Iran Air Airbus. . . ." Exhibit 13, p. 19. On 14 July, the Spanish Representative expressed his belief that the Council should order a fact-finding investigation under Article 55. Exhibit 14, pp. 7-8.

[2] Rules, op. cit., Exhibit 6, Art. 6(2).

The United States had, and exercised, a right as a member of the Council to vote on matters concerning the incident of 3 July 1988, which would have been precluded under Article 84. As noted above, Article 84 of the Convention unequivocally precludes a State which is a party to a dispute submitted to the Council under that Article from voting in the Council's consideration of such dispute. This prohibition is carried forward into Article 15(5) of the Rules in exactly the same language as is employed in Article 84.

Had the Council been acting under Article 84, therefore, the United States would have been deprived of the opportunity to exercise its right to vote in the Council's is consideration of the 3 July 1988 incident. It is significant, therefore, that the United States did exercise its right to vote in the Council's consideration of that incident, not only by joining in the adoption by consensus of the Council resolution of 17 March 1989 and in the ICAO decisions taken on 14 July and 7 December 1988, but also in voting in opposition to an amendment to the 17 March resolution offered by the member of the Council from Czechoslovakia[1]. At no time before, during, or after those votes was any objection made to the right of the United States to cast its vote; nor did any discussion take place in the Council concerning the question. This fact is particularly significant in that Iran participated throughout the Council's consideration of this matter, yet never raised the issue of U.S. voting. It is also significant to bear in mind that the Director of the ICAO Legal Bureau, the foremost expert in ICAO procedures, attended that session[2] and yet neither raised directly nor apparently brought to the attention of the President of the Council what would have been a crucial and obvious procedural point had the proceeding been bought under Article 84. In light of the clear prohibition in Article 84 on the voting of parties to a dispute brought before the Council under that Article, Iran's silence, and the silence of all other participants, provide additional confirmation that the Council did not decide a dispute under Article 84.

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[1] The fact that the United States voted can be established from the Council Minutes of 17 March 1989. Exhibit 21. As noted in the record of attendance of that meeting, thirty-one Council members attended the meeting. The record of the vote -- six votes in favor, nineteen opposed, and six abstentions -- clearly establishes that all Council members in attendance, including the U.S. Representative, voted on the proposed amendment. Ibid., p. 10.

[2] The presence of Dr. Michael Milde, the Director of the ICAO Legal Bureau, is reflected in the attendance list in ICAO Minutes of the 17 March 1989 Council meeting. Exhibit 21, p. 1.

The resolution adopted by the Council on 17 March 1989 did not, on its face, decide or otherwise address a dispute under Article 84 of the Chicago Convention. In those rare instances in which the Council decides a disagreement between Contracting States, the Rules require it to do so in a distinctive manner. Indeed, the Rules require that an Article 84 decision be presented in a form not very different from judgments of this Court under Article 95 of the Rules of Court. Specifically, Article 15 of the Rules provides, *inter alia*, that:

> "(2) The decision of the Council shall be in writing and shall contain:
>
> (i) the date on which it is delivered;
>
> (ii) a list of the Members of the Council participating;
>
> (iii) the names of the parties and of their agents;
>
> (iv) a summary of the proceedings;
>
> (v) the conclusions of the Council together with its reasons for reaching them;
>
> (vi) its decision, if any, in regard to costs;

(vii) a statement of the voting in Council showing whether the conclusions were unanimous or by a majority vote, and if by a majority, giving the number of Members of the Council who voted in favour of the conclusions and the number of those who voted against or abstained.

(3) Any Member of the Council who voted against the majority opinion may have its views recorded in the form of a dissenting opinion which shall be attached to the decision of the Council.

(4) The decision of the Council shall be rendered at a meeting of the Council called for that purpose which shall be held as soon as practicable after the close of the proceedings."

The text of the Council resolution of 17 March 1989 manifestly does not follow these distinctive and well known requirements for Council decisions under Article 84:

"THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

Recalling its decisions of 14 July and 7 December 1988 concerning the shooting down, on 3 July 1988, of Iran Air Airbus 300 on flight IR655 by a warship of the United States;

Having considered the report of the fact-finding investigation instituted by the Secretary General pursuant to the decision of the Council of 14 July 1988 and the subsequent study by the Air Navigation Commission of the safety recommendations presented in that report;

Expressing appreciation for the full co-operation extended to the fact-finding mission by the authorities of all States concerned;

Recalling that the 25th Session (Extraordinary) of the Assembly in 1984 unanimously recognized the duty of States to refrain from the use of weapons against civil aircraft in flight;

> *Reaffirming* its policy to condemn the use of weapons against civil aircraft in flight without prejudice to the provisions of the Charter of the United Nations;
>
> *Deeply deplores* the tragic incident which occurred as a consequence of events and errors in identification of the aircraft which resulted in the accidental destruction of an Iran Air airliner and the loss of 290 lives;
>
> *Expresses* again its profound sympathy and condolences to the Government of the Islamic Republic of Iran and to the bereaved families;
>
> *Appeals again* urgently to all Contracting States which have not yet done so to ratify, as soon as possible, the Protocol introducing Article 3 *bis* into the Convention on International Civil Aviation;
>
> *Notes* the report of the fact-finding investigation instituted by the Secretary General and endorses the conclusions of the Air Navigation Commission on the safety recommendations contained therein;
>
> *Urges* States to take all necessary measures to safeguard the safety of air navigation, particularly by assuring effective co-ordination of civil and military activities and the proper identification of civil aircraft."

It is clear from that resolution that the Council had been acting throughout under its general authority deriving from Articles 54 and 55 of the Convention, and was not acting as a quasi-judicial body sitting to decide a disagreement or dispute between Iran and the United States relating to the interpretation or application of the Convention. Indeed, the resolution does not even refer to a dispute between two States, much less purport to decide such a dispute. Nor does it contain a list of members of the Council who participated, the names of the parties and their agents, a summary of the proceedings, the conclusions of the Council with its reasons for reaching them, or a statement of the voting. In light of the repeated Iranian criticism of the Council's refusal to condemn the United States, moreover, it is significant that the 17 March resolution, in its fifth paragraph, noted that such condemnations were a question of "policy".

The Council resolution provides an excellent summary of deliberations of the Council throughout its discussion of the Iran Air incident. Throughout, the Council responsibly and dispassionately carried out its Article 54 and 55 responsibilities to assess the facts which led to the tragic downing of the Iran Air airliner and took necessary steps to ensure that such tragedies would not recur. When seen in this light, the Council's 17 March resolution ably completed the task presented to it eight months earlier by the President of the Council to reach a complete technical understanding of the chain of events which led to the tragedy, to explore possible changes to ICAO Standards and Recommended Practices, to appeal to States not to compromise the safety of civil air navigation, and to take other necessary technical steps to make sure that similar disasters would not recur.

Iran's attempt to recharacterize those proceedings and that resolution as a legal proceeding under Article 84 and then to criticize the Council for not acting in a sufficiently judicial manner must be rejected.

Section III. The Conclusion That This Was Not an Article 84 Dispute Has Been Confirmed by ICAO.

Less than three months after the ICAO Council action was completed on this matter, a senior officer in the ICAO Secretariat confirmed, in an official communication to the Office of the Registrar of the Court, that the matter was not submitted to ICAO under Article 84, nor treated as such. Pursuant to a 24 May 1989 request to ICAO for information, ICAO's Legal Bureau Director, Dr. Michael Milde, informed the Court's Registrar's Office of that fact:

> "You will note that the proceedings in the Council [on the 3 July 1988 incident] did not follow these Rules for the Settlement of Differences because the matter was not submitted to the Council under the terms of Chapter XVIII of the Convention on International Civil Aviation (Articles 84 to 88) but was considered under the terms of Article 54(n).
>
> The matter before the Council was not framed as a difference or disagreement on the interpretation or application of the Convention on International Civil

Aviation and its annexes; similarly, the interpretation and application of the Montreal Convention of 1971 was not the subject of the deliberations by the Council of ICAO[1]."

This statement is highly relevant and probative in a number of respects. First, coming from one of the foremost experts in the field of aviation law, the Chicago Convention, and ICAO, the ICAO Legal Bureau Director's opinion on the subject is entitled to great weight[2].

Equally important, his statement, coming shortly after the Council's completion of its work on the 3 July 1988 incident, is powerful evidence of the state of mind of the participants in those deliberations. As reflected in the Minutes of those sessions[3], Dr. Milde, in his capacity as Legal Bureau

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[1] This letter from ICAO Legal Director Michael Milde to the Court's Deputy Registrar Bernard Noble appears at Exhibit 24.

[2] Dr. Milde, LL.M., Ph.D., received his legal training in Czechoslovakia, the Netherlands, and Canada. He is the Director of the ICAO Legal Bureau and professor of international aviation law at McGill University in Montreal, Canada. Since 1 June 1989, Dr. Milde has held the position as Director of McGill University's Institute of Air and Space Law. It should also be noted that the Iranian Memorial cites Dr. Milde as an authority on international air law. Iranian Memorial, para. 3.16, n. 2; para. 2.41, n. 1.

[3] See Exhibit 13, p. 1; Exhibit 14, p. 1; Exhibit 15, p. 1; Exhibit 16, p. 1; Exhibit 17, p. 1; Exhibit 19, p. 1; Exhibit 20, p. 1; and Exhibit 21, p. 1.

Director, was a participant in Council sessions in which the matter was discussed. Quite clearly, the Organization believed that it was not deciding a dispute under Article 84, but rather was addressing the matter in its policy role under Article 54(n). In addition to the other evidence submitted above, the statement of the ICAO Legal Bureau Director removes any possible doubt that the issue before the ICAO Council could have satisfied the requirements of Article 84.

CHAPTER III

IRAN'S ATTEMPT TO EVADE THE CLEAR PROVISIONS OF THE CHICAGO CONVENTION WOULD BE HIGHLY PREJUDICIAL TO THE PROPER FUNCTIONING OF ICAO.

As the discussion above indicates, Iran could always have attempted to initiate proceedings in the ICAO Council on the basis of Article 84 of the Chicago Convention and the Rules for the Settlement of Differences. For reasons of its own, Iran chose not to do so. Now, dissatisfied with the resolution reached by the Council, Iran attempts to challenge that decision, a decision embodying both policy and technical elements and reached after prolonged examination both by the ICAO investigation and by the technical examination of the ICAO Air Navigation Commission. In essence, Iran is asking the Court to ignore the constitutional basis on which the ICAO Council acted, namely Article 54 of the Chicago Convention, and by some sleight of hand transmute those proceedings into something entirely different, namely proceedings under Article 84 leading to a decision on a disagreement between the parties relating to the interpretation or the application of the Chicago Convention. In so doing, Iran is asking the Court to embark upon a course of action that would be highly prejudicial to the United States and, indeed, to all parties to the Chicago Convention, to the duly constituted organs of ICAO, particularly the ICAO Council, and to the proper functioning of the whole of the International Civil Aviation Organization.

Section I. The Respect Due a Coordinate Body of the United Nations Obliges the Court to Reject Iran's Claims.

The acts of ICAO, a specialized agency of the United Nations' system, are entitled to respect and deference on the part of other organs and elements of the United Nations system, including this Court. Iran, in basing its jurisdictional allegations on Article 84 of the Chicago Convention, is necessarily asking that the Court determine that the Council resolution of 17 March 1989 constitutes a "decision" of the Council taken pursuant to Article 84 of the Convention. As the United States has shown, Iran, the United States, the Council, and the ICAO Secretariat did not believe themselves to be acting pursuant to Article 84 in connection with consideration of the 3 July 1988 incident at any time up to or during the adoption of the 17 March 1989 resolution. Iran is asking the Court to find otherwise, notwithstanding the overwhelming uncontroverted record to the contrary.

What Iran seeks is a distortion of the carefully structured dispute settlement regime of the Chicago Convention. Iran seeks to have the Court impose upon the ICAO Council an interpretation of the Council's actions in respect of the 3 July 1988 incident that is not only unsupported by Article 84 of the Convention and its implementing Rules for the Settlement of Differences, but is also entirely at variance with Iran's own actions in bringing the matter to the attention of the Council, and the Council's intentions and purposes in its consideration of the matter. In effect, the interpretation Iran is putting forward requires such a broad reading of Article 84 that it would severely disrupt the established manner in which the Council regularly deals with disagreements and disputes relating to the interpretation or the application of the Convention. These assertions open the way for any party to the Convention -- not merely a party to a particular disagreement or dispute -- that considers itself dissatisfied with any decision of the ICAO Council to invoke Article 84 retroactively and initiate recourse to this Court. This would turn the whole system of the Chicago Convention upside down.

Section II. The "Supervisory Role" of the Court Should Not Be Used in the Manner Suggested by Iran.

In its Memorial, Iran seeks to rely on this Court's decision in Appeal Relating to the Jurisdiction of the ICAO Council (hereinafter, the "Appeal" case)[1] to support the argument that this Court should take an expansive view of its appeal authority and, accordingly, find jurisdiction over the 17 March 1989 ICAO Council resolution. Such assertions are misplaced and misleading, as nothing in the Court's judgment in the Appeal case suggests that Iran's distorted view of Article 84 and the Court's jurisdiction thereunder has merit.

In the Appeal case, the issue before the Court was the limited one of whether an interlocutory decision of the Council, acting under Article 84, constituted a "decision" of the Council within the meaning of Article 84 so as to confer jurisdiction on this Court by way of "appeal". In that proceeding, however, there was no doubt in that case that the Court had jurisdiction in relation to the underlying dispute which had been brought for decision before the ICAO Council, which had indeed been properly seised by India as required by Article 84 of the Convention and Article 2 of the Rules for the Settlement of Differences[1]. This was common ground between the parties in that case and was not challenged either in the ICAO Council or in this Court. It follows that a principal issue in the present proceedings -- namely whether the Court has the jurisdiction to entertain a case presented as an appeal under Article 84 of the Chicago Convention when the impugned decision of the Council itself was not taken in application of Article 84 -- simply did not arise in that case.

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[1] I.C.J. Reports 1972, p. 46.

There is nothing in the Court's decision that would indicate that it believed that its supervisory function over the quasi-judicial determinations of the Council under Article

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[1] See, e.g., Repertory - Guide, op. cit., Exhibit 69, Art. 84, pp. 3-4; and G. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council", 12 Canadian Yearbook of Int'l Law, p. 153, at pp. 159-60 (1974) (Exhibit 73).

84 would in any way extend to include the review of Council technical and policy determinations under other articles of the Chicago Convention. There is nothing in the Convention that could possibly support the exercise by the Court of "supervisory" functions over matters not considered under Article 84.

The Court's judgment in the *Appeal* case does, however, have certain relevance insofar as the nature of the Court's functions and responsibilities under Article 84 are concerned. As to this matter the Court noted that:

> "The case is presented to the Court in the guise of an ordinary dispute between States (and such a dispute underlies it). Yet in the proceedings before the Court, it is the act of a third entity -- the Council of ICAO -- which one of the Parties is impugning and the other defending. In that aspect of the matter, the appeal to the Court contemplated by the Chicago Convention and the Transit Agreement must be regarded as an element of the general regime established in respect of ICAO[1]."

In bringing the instant proceeding, Iran is asking the Court to depart from its special responsibilities with respect to the "good functioning" of ICAO by finding jurisdiction to exist under Article 84 in circumstances in which absolutely no support for such jurisdiction may be found in the text of Article 84 or its implementing Rules, or in the record of the Council proceedings that led ultimately to the resolution of 17 March 1989. Iran's request must be rejected.

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[1] *I.C.J. Reports 1972*, p. 46, at p. 60.

Section III. The Decision Requested of this Court by Iran Would Frustrate the Dispute-Settlement Regime Established in the Chicago Convention and by ICAO and Would Threaten the Institutional Integrity of ICAO.

The Government of Iran, for reasons known only to itself, did not invoke the established and exclusive procedures for Council resolution of disputes under Convention Article 84. Accordingly and as a matter of course, the Council proceeded to deal with the incident of 13 July 1988 pursuant to Article 54, as it routinely does with respect to aviation matters in which Article 84 has not been expressly, and properly, invoked. The Application filed by Iran to institute the instant proceedings, however, proceeds on an entirely different basis, attempting as it does to rewrite what occurred in the ICAO Council. To add to the deliberate confusion Iran is attempting to create, in its Memorial it criticizes the Council for doing precisely what it is supposed to do, namely, taking into consideration factors of aviation policy and political factors in reaching the decision that it adopted on 17 March 1989[1].

Iran asks this Court to circumvent the longstanding and comprehensive procedures adopted by ICAO, and thereby frustrate and in effect nullify the regime carefully adopted by the Organization and accepted by its Contracting States for more than thirty years. Such a decision could threaten the institutional integrity of ICAO. As a Member of this Court has stated:

> ". . . the Contracting States have the right to expect that the Council will faithfully follow these rules, performing as it does, in such situations, quasi-judicial functions, for they are an integral part of its jurisdiction. Such rules constitute one of the guarantees of the proper

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[1] Iran's statements in paragraphs 2.41, 2.57, and 2.59 of its Memorial are typical in this respect. One particular grievance raised by Iran in its Memorial is the Council's differing treatment of the Iran Air Incident from the 1983 KAL 007 shootdown and the 1973 downing of a Libyan civilian airliner by Israel. Iranian Memorial, paras. 2.36-2.41. Clearly the Iranian argument is premised on a belief that the 17 March 1989 Council decision is similar in nature to the 4 June 1973 Council decision regarding the shootdown of Libyan aircraft and the 5 March 1984 resolution regarding the downing of Korean Air Lines Flight 007. This comparison, in one respect, is apt, as ICAO Council actions in both instances did not involve a resolution of disagreements under Article 84. As established above, the Council in both aforementioned prior instances acted pursuant to Articles 54 and 55.

> decision-making of any collective body of this character and they set a framework for its regular functioning: as such, they are enacted to be complied with[1]."

Every year, the Council makes a very large number of "decisions" in a wide array of matters. Many of these decisions and resolutions necessarily, and to a greater or lesser extent, implicate issues of law. As noted above, Article 54(n) gives the Council competence to "[c]onsider any matter relating to the Convention which any Contracting State refers to it." On its own initiative, the Council reviews other matters related to the provisions of the Convention. Under the Convention, these decisions are final and not subject to appeal to any judicial body.

Allowing Iran to evade the long-established procedures for bringing Article 84 disputes before the Council could open up for review virtually all actions of the Council that might be said to implicate or involve one or more provisions of the Convention. Subjecting such decisions to lengthy judicial review could delay crucial aviation safety-related actions of the Council and cripple the operation of ICAO. The United

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[1] I.C.J. Reports 1972, p. 46, at pp. 74-75 (Declaration of Judge Lachs).

States respectfully submits that this result would not be consistent with the terms or intent of the Chicago Convention, or the longstanding practice of States under that Convention.

Iran's actions in this regard, moreover, would violate the clear language and intent of Article 84, under which this Court acts as a court of appeals rather than as a court of first instance. As an appellate court, this Court functions as a judicial body of the highest order, determining questions of law based on a full, and fully-articulated, legal record developed by the contending parties. In such circumstances, the Court's proper functioning depends greatly on its ability to review and assess the legal positions of the parties, based on a coherent legal record deriving from the proceedings of the forum from which the appeal has been taken. As established above, no such record exists in this case, for the simple reason that none of the concerned parties -- not the United States, the Council, or, indeed, even Iran -- conceived that the prior Council discussions and resolutions had a judicial character, from which an appeal to this Court would be available. None so conceived, and none so acted.

In short, the Council did not deal with the matter before it in a quasi-judicial proceeding. The legal questions that Iran seeks to have this Court confront were neither confronted, nor decided, by the Council under Article 84 of the Convention. Rather than function in an appellate capacity, this Court, in effect, has been asked by Iran to act as the court of first instance. That is manifestly not the Court's role under Article 84, and that Article unambiguously does not confer jurisdiction on the Court for that purpose. Iran's claim that the Court has jurisdiction under Article 84 of the Chicago Convention is completely unfounded and should be rejected.

PART IV

THE COURT DOES NOT HAVE JURISDICTION UNDER ARTICLE 14 OF THE 1971 MONTREAL CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF CIVIL AVIATION

Iran asserts that Article 14 of the Montreal Convention confers jurisdiction on the Court in these proceedings[1]. Article 14 of the Convention gives the Court jurisdiction over disputes concerning the interpretation and application of the Convention which cannot be settled through negotiation or arbitration:

> "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

In its Application, Iran asserts that "by refusing to accept liability for the actions of its agents in destruction of Iran Air Flight 655, and by failing to pay compensation for the aircraft, or to work out with the Islamic Republic a proper mechanism for determination and payment of damages due to the bereaved families, the United States has violated Articles 1, 3 and 10(1) of the Montreal Convention[1]." In its Memorial,

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[1] Iranian Memorial, para. 2.63. The Montreal Convention appears at Exhibit 7.

[2] Iranian Application, p. 7.

Iran argues that the United States violated those provisions of the Convention by virtue of its "conduct in destroying Iran Air Flight 655 and in failing to take all practical measures to prevent such an offense and to make it punishable by severe penalties[1]." More specifically, Iran argues that both the United States and the Commanding Officer of the USS Vincennes violated Article 1 of the Convention[2] and that the United States violated Article 3 and 10(1)[3].

Iran cannot rely upon the Montreal Convention as a basis for jurisdiction because Iran has failed to establish that its dispute with the United States regarding this matter could not be settled through negotiation. In fact, prior to filing this proceeding, Iran rebuffed all attempts by the United States to discuss the payment of compensation.

Likewise, Iran wholly disregarded the additional and independent requirement of Article 14 that it seek arbitration of the dispute for a period of six months prior to reference to the Court. In fact, during this period Iran never requested or tried to organize the arbitration of the dispute and disregarded attempts by the United States to discuss compensation, notwithstanding the extensive negotiations and arbitrations on claims issues which the two governments were conducting on a daily basis at The Hague.

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[1] Iranian Memorial, para. 2.61.

[2] Iranian Memorial, paras. 3.58, 3.59, and 4.57.

[3] Iranian Memorial, paras. 3.60, 3.61, and 4.73.

Moreover, the Montreal Convention cannot provide a basis for jurisdiction in these proceedings because the Convention has no connection to the downing of Iran Air Flight 655. The Convention addresses criminal acts by individuals against the safety of civil aircraft. It was never intended to address the responsibility of States for any actions they may take against such aircraft, particularly actions taken by armed forces engaged in hostile action. The actions at issue here are governed by the laws of armed conflict--an entirely separate and independent branch of law for which ICAO has no responsibility and which the parties to the Montreal Convention and other conventions dealing with civil aircraft did not purport to address.

The Court can determine these threshold issues on the basis of preliminary objections and should not proceed to the merits of Iran's claims until the jurisdiction of the Court is determined.

CHAPTER I

IRAN HAS FAILED TO SATISFY THE REQUIREMENT THAT IT SEEK TO NEGOTIATE OR TO ARBITRATE BEFORE INSTITUTING PROCEEDINGS IN THIS COURT.

In its Application and Memorial, Iran brushes aside the very specific prerequisites to the Court's jurisdiction that are written into Article 14 of the Montreal Convention. Yet the ordinary language of Article 14 without question calls upon a complaining State to seek negotiation and then arbitration prior to submission of a dispute to this Court. Article 14(1) states:

> "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

The comments that were made regarding Article 14 during the conference at which the Montreal Convention was drafted demonstrate that the provision was understood to require an effort by the complaining State to seek agreement on arbitration before referring the dispute to the Court[1].

Article 14(1), therefore, requires an effort by the complaining State to negotiate a settlement of the dispute concerning the interpretation or application of the Convention. If negotiations fail to settle the dispute, the State must seek to arbitrate the dispute. Only if that fails within a period of six months may recourse be had to the Court. The requirements first to negotiate and then to organize an arbitration are not mere formalities. They are clear prerequisites to any right of resort to the Court. Iran clearly failed in any way to meet these essential prerequisites. They cannot be avoided or dismissed as useless based on the relations between Iran and the United States. Indeed, during this same period, Iran and the United States were engaged almost daily in The Hague in intense and largely successful efforts to resolve diplomatically and by arbitration important and politically sensitive claims.

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[1] Only one delegate at the Montreal Conference spoke directly to the requirements of this Article. "Article 14 provided for the reference of disputes to the International Court of Justice in the case of parties unable to agree on arbitration". Exhibit 43, p. 134 (emphasis added). No other delegate took issue with this statement. Indeed, only one other delegate commented on the substance of Article 14, and then only indirectly by associating himself with the previous remarks. Ibid.

With regard to these prerequisites, the language of Article 14 sets an even higher standard of conduct by the complaining Party than exists in many other compromissory clauses of this type. For instance, it sets a higher standard than the compromissory clauses that appeared recently before this Court in both Elettronica Sicula S.p.A. (ELSI)[1] and Military and Paramilitary Activities in and against Nicaragua[2]. In the Nicaragua case, Article XXIV(2) of the 1956 Treaty of Friendship, Commerce and Navigation stated:

> "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means[3]."

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[1] I.C.J. Reports 1989, p. 15.

[2] I.C.J. Reports 1984, p. 392.

[3] I.C.J. Reports 1984, at p. 452 (Separate Opinion of Judge Ruda).

As Judge Ruda stated in commenting on this provision:

> ". . . it is essential that diplomatic negotiations should have taken place prior to coming before the Court, because, first, that is what is set out in clear terms in Article XXIV of the Treaty and second, because it is impossible to know the existence and scope of the dispute without one party submitting a claim against the other, stating the facts and specifying the provisions of the Treaty alleged to have been violated. It is the essence and therefore the indissoluble attributes of the concept of dispute that negotiations between the interested States should precede the institution of proceedings before the Court, because negotiations or the adjustment by diplomacy fixes the points of facts and law over which the parties disagree[1]."

The requirement to negotiate, therefore, cannot be and has never been viewed by the Court as a mere formality.

Article 14 of the Montreal Convention not only contains a requirement to negotiate, it also expressly calls upon the complaining party to seek arbitration within a specified period of time before resorting to resolution of the dispute by this Court. The clear distinction between the requirements of a compromissory clause such as Article 14 of the Montreal Convention and that of the Treaty of Friendship, Commerce and

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[1] Ibid., p. 453. As the Court said in Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, at p. 15, "[B]efore a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations."

Navigation in *Nicaragua* was recognized by Judge Singh:

> "In the aforesaid Treaty [Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons of 1973, Article 13(1)] . . . it would appear that the jurisdictional clause made negotiations an essential condition before proceeding to arbitration; and a lapse of six months from the date of the request for arbitration a condition precedent to referring the dispute to the International Court of Justice[1]."

Not to give effect to the express conditions of Article 14 would undermine the purpose of such conditions, which is to avoid escalating a dispute between States to this forum before the attempt has been made to resolve it through a dialogue between the States or through arbiters of their choosing. Were this Court to brush aside such explicit language, the Court would ultimately serve to discourage States from crafting compromissory clauses in which they believe they are fostering a bilateral, low-profile resolution of disputes.

Section I. Iran Had No Justification for Its Failure to Seek Negotiations or Arbitration Prior to Resort to this Court.

The principal arguments that Iran makes for failing to satisfy the requirement in Article 14 to seek negotiations or request arbitration are that there were no diplomatic channels of communication for pursuing negotiations and that, in any event, a request for arbitration would have been fruitless. In fact, there were a number of diplomatic channels for communicating with the United States and the United States very early indicated its willingness to provide compensation to the victims of this accident and to discuss the matter with Iran.

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[1] *I.C.J. Reports 1984*, at p. 446.

In its Application, Iran makes the following assertion in a footnote:

> "The Islamic Republic of Iran submits that under the circumstances and in particular the United States total refusal of all voluntary methods of pacific settlement of the present dispute, the arbitration referred to in Article 14(1) of the Montreal Convention cannot be considered a viable course of action[1]."

In its Memorial, Iran argues that the extent of public debate over the legality of the United States actions in ICAO and the United Nations Security Council, coupled with the fact that no diplomatic relations exist between the two countries, "demonstrates that it would be fruitless to hope that any further 'negotiation' could be expected to settle the dispute[2]." Iran also criticizes the United States for failing to give any indication that it preferred a separate arbitration over Iran's claims under the Convention to proceedings before the Court[1].

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[1] Iranian Application, p. 6.

[2] Iranian Memorial, para. 2.65.

Iran's assertions notwithstanding, despite the absence of formal diplomatic relations, a number of diplomatic channels existed that provided Iran with the opportunity to request negotiations or arbitration of its claims. On its own volition, Iran simply determined to proceed with the filing of these proceedings without any effort to comply with the requirements of Article 14. Indeed, Iran ignored and rebuffed the persistent efforts of the United States to address with Iran the subject of compensation to the victims of this accident.

From the time of the incident of 3 July 1988 until Iran's Application was filed in this case, the Government of Iran never requested to meet with U.S. officials to negotiate this matter or to discuss arbitration. Although Iran and the United States do not maintain diplomatic relations, Iran could have approached the United States through a number of channels: the U.S. Interests Section at the Swiss Embassy in Tehran; the Iranian Interests Section at the Algerian Embassy in Washington, D.C.; the United Nations; the Iran-U.S. Claims Tribunal in The Hague; or any willing third-country or international organization. These channels have in fact been used by both parties on many occasions to communicate requests and negotiate and resolve specific bilateral issues.

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[1] Iranian Memorial, para. 2.68.

Moreover, there is no basis upon which to conclude that such efforts did not have the potential for succeeding. Quite to the contrary, notwithstanding their political relations, the United States and Iran have, since 1981, been engaged in very substantial and frequent negotiations on claims issues and arbitration before the Iran-U.S. Claims Tribunal involving billions of dollars. Indeed, they have reached agreements settling disputes worth hundreds of millions of dollars and have arbitrated other disputes worth many more hundreds of millions of dollars.

During the very period in question (from 3 July 1988 to 17 May 1989), representatives of the two governments were engaged in ongoing settlement discussions in connection with both private and government-to-government claims before the Tribunal, and representatives of the governments held face-to-face meetings no less than 16 times in The Hague. Such discussions resulted in a large number of settlements. For example, there were 26 awards on agreed terms of U.S. nationals' claims during this period, each authorizing and approving payment of settlements agreed upon by the two governments[1]. Similarly, on 16 March 1989, the Tribunal issued an award on agreed terms reflecting a settlement between Iran and the United States of two claims by agencies of the two governments[2].

The two governments also engaged in active arbitration before the Tribunal. For example, in August 1988, following extensive briefing and oral argument by the two governments, the Tribunal handed down a decision denying Iran's claim for the return of substantial amounts of military equipment held by the United States, but requiring the United States to pay Iran the value of those items[3]. The two sides thereafter engaged in extensive negotiations on the amounts due for various categories of equipment. In addition, in November 1988 Iranian and U.S. arbitrators at the Tribunal agreed on two neutral arbitrators to replace two arbitrators who had resigned[1].

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[1] See Annual Report of the Iran-U.S. Claims Tribunal for the Period Ending 30 June 1989, pp. 184-88 (Exhibit 83).

[2] See Iranian Assets Litigation Reporter, 24 Mar. 1989, pp. 17064-17065 (Exhibit 83).

[3] See Iranian Assets Litigation Reporter, 23 Sep. 1988, pp. 16312-16313 (Exhibit 83).

Through 30 June 1989, the Tribunal had issued a total of 189 awards on agreed terms and 204 awards relating to disputed claims[2]. Including awards in agreed terms, the Tribunal had awarded over US $1,500 million to U.S. and Iranian private and government claimants[3].

Iran's claim that negotiations over any claims arising from the incident of 3 July 1988 would have been fruitless is clearly contradicted by this record of uninterrupted, productive negotiation and arbitration between the two governments.

Iran's assertions that the United States refused other methods of pacific settlement of this matter and refused to express a preference for arbitration are similarly misleading and seek to shift from itself to the United States the burden for satisfying the requirement under Article 14 to request arbitration. Iran fails to identify when or how the United States "refused" such other methods. The reason is that the United States in fact never refused to undertake negotiation or arbitration with Iran. Iran never communicated to the United States a request to enter into negotiations or arbitration about this dispute, whether for purposes of liability under the Chicago Convention or liability on any other basis. Iran did not identify the Montreal Convention as the basis for any claim against the United States in connection with the incident of 3 July 1988 until it filed its Application[1], and even then did not identify the Treaty of Amity as a basis for its claim.

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[1] *See Annual Report, 30 June 1989*, *op. cit.*, Exhibit 83, p. 1; *Annual Report of the Iran-U.S. Claims Tribunal for the Period Ending 30 June 1988*, pp. 3-4 (Exhibit 83).

[2] *Annual Report, 30 June 1989*, *op. cit.*, Exhibit 83, p. 23. These figures do not include partial awards in either category.

[3] *Annual Report, 30 June 1989*, *op. cit.*, Exhibit 83, p. 24.

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[1] The only reference to the Montreal Convention by Iran in its presentation to the ICAO Council or the U.N. Security Council during their deliberations concerning the Iran Air Flight 655 incident was contained in a Working Paper submitted by Iran to the ICAO Council. That reference was contained in a list of general authorities and ICAO actions relating to alleged violations of international law by the United States unrelated to the shootdown of Iran Air 655. See Exhibit 12, ICAO Doc. C-WP/8644.

Contrary to Iran's suggestions[1], it was the United States that repeatedly sought to engage the Government of Iran in this matter, for the purpose of establishing a mechanism for compensating the families of the Iranian victims. By diplomatic demarches throughout 1988 and 1989, the United States sought to engage the Government of Iran and its entities in a discussion of this matter, and especially sought information for purposes of paying compensation to the families of the victims -- compensation now sought by Iran before this Court. Had Iran responded to these overtures, there would perhaps be no need for Iran to now ask this Court for such relief. The fact that the compensation was offered on an *ex gratia* basis and that the United States wished it to be paid directly to the families, does not undermine the willingness of the United States to seek a resolution of this matter. If Iran objected to the terms of the United States offer, it was incumbent on Iran to make a counter-offer through negotiation, or to request that unresolved issues be put to an arbitral tribunal. Iran, however, did nothing along these lines prior to filing its Application before this Court.

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[1] Iranian Memorial, para. 2.68.

Nor can Iran rely upon differences between its position and that of the United States on the substance of its claims to excuse its failure to seek negotiations or arbitration. The purpose of negotiations and arbitration is to resolve such differences.

Section II. The Court's Prior Rulings Require a Much Greater Effort at Resolving a Dispute Than Has Been Shown by Iran.

Prior rulings by this Court are clear that a much greater effort by Iran at resolving this dispute is necessary before it can be said that further negotiations are futile. At the time the Application was filed in this case, there was no discussion between the parties that resulted in a deadlock or in a refusal of one of the parties to go on[1]. Rather, the longstanding and highly successful negotiations and arbitrations between

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[1] See Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, at p. 13.

Iran and the United States at the Claims Tribunal and the United States' offer to pay compensation is evidence that no deadlock existed on the basis of which the Court might find that "no reasonable probability exists that further negotiations would lead to a settlement[1]." In reality, Iran by its Application -- not the United States by its offers to engage Iran on the question of compensation -- preempted the possibility for negotiation or arbitration.

The requirement to seek arbitration is in no way conditioned on the notion that the requirement may be ignored if the effort appears fruitless. At a minimum, a request for arbitration must be made, the moving party must be prepared to engage in discussion of the terms for such an arbitration, and six months must elapse, before there is any right to resort to the Court. Iran complied with none of these essential requirements.

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[1] South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319, at p. 345.

But even if there is thought to be some exception where negotiations or arbitration is not a reasonable probability, the burden is upon Iran to show that there was and is no "reasonable probability" that diplomatic negotiations or arbitration between Iran and the United States can resolve this dispute. When faced with a similar burden in United States Diplomatic and Consular Staff in Tehran, the United States introduced evidence that Iran had refused to receive a representative sent to negotiate on the matter (Mr. Ramsey Clark) and that the Ayatollah Khomeini had ordered that under no circumstances should members of the Islamic Revolutionary Council meet with U.S. representatives[1].

Iran can produce no such evidence in this case. The Government of Iran made no effort to provide a representative to negotiate this issue. If the Iran Insurance Company constitutes such a representative, it did not identify itself as such, and did not respond to efforts by the United States to determine its relationship to the Government of Iran. There was never any statement by the United States that it was unwilling to talk with Iranian Government representatives about this matter. Moreover, Iran did not respond to repeated efforts by the United States to resolve this matter.

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[1] I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran, pp. 136-37.

Indeed, the record clearly indicates that Iran never considered this case in light of the Montreal Convention until it decided to go to the Court and began casting about for a basis of jurisdiction to do so. Certainly, Iran never made any attempt to satisfy its obligation to negotiate or seek arbitration under the Montreal Convention.

CHAPTER II

THE CLAIMS SUBMITTED BY IRAN HAVE NO CONNECTION TO THE MONTREAL CONVENTION.

As demonstrated in Part II, the mere assertion by Iran that the United States' actions relate to the Montreal Convention is not sufficient to establish the jurisdiction of the Court. Iran must establish a reasonable connection between the subject matter of the dispute and the Convention.

Iran argues that the mere assertion of a violation of an agreement providing jurisdiction for the Court to entertain disputes is sufficient to establish jurisdiction under that convention. Thus, after alleging violations by the United States of the Montreal Convention, Iran asserts that "[t]he very fact that the United States denies any legal responsibility for its actions evidences the existence of a dispute" concerning the interpretation or application of the Convention[1]. Such an assertion flies in the face of simple logic and the pronouncements of the Court.

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[1] Iranian Memorial, para. 2.63.

The principal issue is a purely a question of law: whether the Montreal Convention is relevant to the facts upon which the claims asserted by Iran rest. Both the terms of the Convention and its history, as well as subsequent practice, demonstrate that the Convention does not address the actions of States against civil aircraft, and in particular clearly does not apply to the actions of a State's armed forces engaged in armed conflict.

Section I. The Terms of the Montreal Convention and Its History Demonstrate That Offenses Referred to in That Convention Relate to the Conduct of Individuals, Not to the Actions of States Against Civil Aircraft.

In the first instance, a treaty is to be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose[1]. On its face, the Montreal Convention addresses acts against civil aircraft committed by individuals -- not by States.

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[1] See Vienna Convention on the Law of Treaties, Art. 31(1), U.N. Doc. A/CONF. 39/27, p. 293 (1969), reflecting customary international law on this point.

(Individual terrorists might, of course, be covertly directed or supported by States in particular incidents; that, however, is not the situation in the present case.)

Although the Convention establishes various obligations on Contracting States, these obligations only apply in cases where "persons" have committed offenses under Article 1[1]. Specifically, Article 1 provides:

> "1. Any person commits an offence if he unlawfully and intentionally:
>
> (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
>
> (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
>
> (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

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[1] Iran's assertion to the contrary notwithstanding (Iranian Memorial, para. 3.55), the 1988 Convention on Maritime Safety (Exhibit 74) does not define "person" to include a foreign State.

(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

(e) communicates information which _he_ knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any _person_ also commits an offence if _he_:

(a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or

(b) is an accomplice of a person who commits or attempts to commit any such offence."

(Emphasis added.)

The use of the terms "person" and "he" in their ordinary meaning does not refer to States or governments, which are abstract and incorporeal entities. Moreover, the actions which are made offenses under Article 1 generally describe common criminal activities of individuals, not the activities of States[1].

Had the Contracting States to the Montreal Convention intended the word "person" to be interpreted in a manner different from its common meaning, they would have so defined the term or otherwise given some other clear indication of their intent to do so. No such definition or indication exists. Indeed, the meaning of the term, when read in the context of the Montreal Convention, confirms that the Contracting States used the term to apply to human beings, and not to States or governments. For example, throughout the Convention a "person" who perpetrates an "offence," i.e., an "offender," is referred to as "he" or "him"[1]. Article 5 speaks of extraditing the "offender" and Article 6 speaks of taking "him" into custody. That article also refers to an offender's physical presence in the territory of a Contracting State and communications with the State of which the "person" is a "national". Such provisions would become nonsensical and meaningless if the word "persons" included States or governments.

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[1] _See also_ Exhibit 7, Arts. 7, 8, and 13.

Moreover, the history of the Montreal Convention makes clear that the "unlawful" acts to which the Convention refers are sabotage and other terrorist or criminal activities of individuals. The 1971 Montreal (Sabotage) Convention was intended to complement the 1963 Tokyo Convention and the 1970

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[1] *See, e.g.*, Exhibit 7, Arts. 5, 6, and 7.

Hague (Hijacking) Convention[1]. All three were developed in response to hijackings and other terrorist actions committed by individuals against civilian aircraft. The Tokyo Convention requires States to take all appropriate measures to restore control of the hijacked aircraft to its commander and to permit its passengers and crew to continue their journey as soon as practicable. The Hague Convention is designed to pick up where the Tokyo Convention left off. When a plane is hijacked and diverted to another State, the Convention obligates the receiving State to apprehend the hijacker and either prosecute or extradite him. The Montreal Convention is similar to the Hague Convention in that it obligates States to apprehend offenders and either prosecute or extradite them.

As the United Nations General Assembly noted in 1969, when urging support for the efforts of ICAO in preparing the Hague Convention, the need for the Convention was made clear by the large number of hijackings by individuals that occurred in the late 1960s, over forty in 1969 alone[1].

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[1] See Convention on Offences and Certain Other Acts Committed On Board Aircraft of 1963 (the "Tokyo Convention") (Exhibit 75); Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 (the "Hague Convention") (Exhibit 76).

The immediate impetus for the Montreal Convention was two acts of aircraft sabotage that occurred in Europe on 21 February 1970, one involving SWISSAIR and the other Austrian Airlines. The acts were planned and perpetrated by individual terrorists. As a result of these incidents, the Swiss and the Austrian Governments asked the ICAO Council to convene on an urgent basis an international conference on aviation security. In March, a formal request was made by the member States of the European Civil Aviation Conference for an Extraordinary Session of the ICAO Assembly on the subject. The Assembly convened in June and directed the ICAO Legal Committee to prepare before November 1970 a draft convention on acts of violence against international civil aviation (other than acts covered by the draft convention on unlawful seizure of aircraft) for consideration at a diplomatic conference no later than the summer of 1971[1]. The ICAO Legal Committee prepared a draft convention modelled on the draft convention on unlawful seizures (hijacking) of aircraft. ICAO convened a diplomatic conference in September of 1971 to consider and approve the proposed convention[2].

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[1] UNGA Res. 2551 (24th sess., 1969); see also UNGA Res. 2645 (25th sess., 1970) (urging full support for the diplomatic conference convened by ICAO at The Hague in 1970 for the purpose of adopting the Hague Convention); UN Security Council Res. 286 (1554th meeting, 1970).

At the conference, it was generally agreed that the provisions of the new convention should follow the approach of the recently adopted Hague (Hijacking) Convention. Article 1 describes a series of acts which constitute offenses under the Montreal Convention. In developing Article 1 of the draft convention, the Legal Committee of ICAO determined that an act would not constitute an offense if the act or omission was done with legal authority, in self-defense, or with other legal justification[3]. The initial language of that Article goes even further by also requiring the intention to deliberately commit an unlawful act. It provides that "any person commits an offense if he unlawfully and intentionally" performs one of the listed acts.

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[1] Minutes and Documents, International Conference on Air Law (Sep. 1971), ICAO Doc. 9081, pp. 1-2 (Exhibit 43).

[2] See generally Exhibit 43.

[3] Documents, ICAO Legal Committee (18th sess., Sep. - Oct. 1970), ICAO Doc. 8910, reprinted in ICAO Doc. 8936, Vol. 2, p. 16 (Exhibit 42).

It is clear from an examination of the terms of the Convention and its history that it does not relate to the actions of States against civil aircraft. The object and purpose of the Convention, and its companion convention on hijacking, was to prevent and deter individual saboteurs and terrorists from unlawfully interfering with civil aviation and to ensure the punishment of such individuals. (Again, individual terrorists might be covertly directed or assisted by States in particular incidents; that, however, is not the situation in the present case.)

Section II. Subsequent Practice in the Application of the Montreal Convention Further Establishes That the Convention Does Not Apply to the Actions of States Against Civil Aircraft.

When considering the context of the terms of a treaty, it is appropriate to take into account any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[1]. In examining subsequent practice with respect to the Montreal Convention, it is particularly useful to look to actions taken by ICAO, because ICAO is the principal international organization responsible for matters relating to civil aviation and was responsible for producing the Montreal Convention and other Conventions on civil aviation[2]. Moreover, all of the parties to the Montreal Convention are members of ICAO.

Since the Montreal Convention entered into force in 1973, ICAO has considered two previous incidents involving the shootdown of a civilian airliner by the forces of a State. While ICAO condemned those uses of force against civil aircraft, it did not rely upon the Montreal Convention in making these condemnations, nor did the States whose nationals were affected. On the contrary, ICAO has responded to incidents of State action against civilian aircraft by considering the adoption of new international agreements that would address such acts.

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[1] See Vienna Convention on the Law of Treaties, Art. 31(3)(b), reflecting customary international law.

[2] Art. 44 of the Chicago Convention assigns to ICAO the functions of developing the principles and techniques of international air navigation and fostering the planning and development of international air transport so as to ensure the safe and orderly growth of international civil aviation throughout the world. For example, ICAO was responsible for developing the Tokyo Convention of 1963 and the Hague Convention of 1970, upon which the Montreal Convention was modelled, as well as the Rome (Terrorism) Convention of 1980.

ICAO has not referred to the Montreal Convention in condemning actions of States against civilian aviation. On 21 February 1973, military aircraft of the Government of Israel deliberately shot down a Libyan civilian airliner that was off-course, flying over Israeli military sites in the Sinai, which was a highly sensitive military area. The Montreal Convention had entered into force less than a month before the incident, on 26 January 1973. Israel and nearly twenty other ICAO members had already become parties. Nonetheless, the Montreal Convention never entered into the intense ICAO discussion of the incident.

The ICAO Assembly discussed the incident at an extraordinary session that met from 27 February to 2 March 1973[1]. Over forty delegates made statements on the incident. Most of the speakers strongly denounced Israel's action. During the politically charged debate, delegates characterized Israel's deliberate downing of a civilian airliner as a "violation of international law", and a violation of the Chicago Convention[1]. No delegate, however, mentioned the Montreal Convention. On the contrary, the delegate from Pakistan stated:

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[1] See Minutes, ICAO Assembly (19th sess. - extra., Feb. - Mar. 1973), ICAO Doc. 9061, pp. 17-64 (Exhibit 45).

> "This incident had given a new dimension to the problem of unlawful interference with international civil aviation. So far, it had been the problem of interference by individuals for which ICAO had been trying to find a solution. Now, thousands of passengers on aircraft operating in troubled areas of the world faced another kind of threat, which might give rise to serious doubts about the safety of civil aviation generally[2]."

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[1] The Yugoslavian delegate described the action as a "clear violation of international law as well as of the principles and purposes of the International Civil Aviation Organization". Exhibit 45, p. 40. More particularly, many delegates stated that the action was a violation of the Chicago Convention. See, e.g., ibid., p. 35 (statement of Lebanon), p. 40 (statement of Senegal), p. 41 (statement of Malaysia), p. 44 (statement of Burundi).

[2] Exhibit 45, p. 43.

After considering the incident, the Assembly adopted a resolution condemning the Israeli action and instituting an investigation[1].

The ICAO Council considered the report of the investigation at its 79th session in June 1973. Again, no delegate raised the Montreal Convention[2]. The Council adopted a resolution in which the Council recalled Israel's actions, stated that it was "convinced that such actions constitute a serious danger against the safety of international civil aviation," "recogniz[ed] that such attitude is a flagrant violation of the principles enshrined in the Chicago Convention," "strongly condemn[ed] the Israeli action", and urged Israel "to comply with the aims and objectives of the Chicago Convention[3]."

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[1] Exhibit 45, Res. A19-1, p. 11.

[2] Minutes, ICAO Council (79th sess., June 1973, closed), ICAO Doc. 9073 (Exhibit 47).

[3] Action of the ICAO Council (79th sess., May - June 1973), ICAO Doc. 9097, p. 33 (Exhibit 46).

Neither of these resolutions mentioned the Montreal Convention. This omission must have been deliberate, since the delegates to the Assembly and the Council were familiar with the terms of the Montreal Convention, which (as noted above) had been adopted at a September 1971 international conference convened under ICAO's auspices, had recently entered into force, and was in force with respect to Israel.

More recently, on 1 September 1983, a Soviet military airplane deliberately shot down a Korean civil airliner after Soviet authorities had tracked the aircraft for over two hours by radar and visually tracked the aircraft for over twenty minutes. Again, the Soviet Union and Korea were parties to the Convention at the time of the incident, but the Convention was not discussed during intense ICAO debate.

On 15 and 16 September, the ICAO Council met in extraordinary session to discuss the incident[1]. Many delegates strongly condemned the Soviet action. And, as in ICAO's consideration of the 1973 shootdown, while delegates described the incident as a violation of international law and of the Chicago Convention[1], they did not cite the Montreal Convention.

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[1] See Minutes, ICAO Council (extra. sess., Sep. 1983), ICAO Doc. 9416 (Exhibit 55).

The Council adopted a resolution recognizing the airliner's destruction as incompatible with the Chicago Convention, and directing the Secretary General to investigate the incident[2]. There was no mention in the resolution of the Montreal Convention. On 1 October 1983, the ICAO Assembly endorsed the resolution and urged ICAO Member States to co-operate in its implementation, without mentioning the Montreal Convention[1].

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[1] For example, the delegate of the Federal Republic of Germany stated that "the spirit and the principles of the ICAO Convention and its Annex 2 have obviously been violated." Exhibit 55, p. 17. The delegate of the United States said that the incident violated "not only the basic principles set forth in the Convention, but also the fundamental norms of international law enshrined in the Charter of the United Nations and established firmly in the practice of the civilized world." Ibid., p. 23. The delegate of the United Kingdom stated: "My government regards such explanations as have been given [by the Soviet Union] as falling well short of valid justification for the actions of the Soviet military authorities in international law." Ibid., p. 36. The delegate of Jamaica condemned the shootdown "as a grave violation of international law, particularly in relation to the safety regulations of the International Civil Aviation Organization of which the USSR is a member." Ibid., p. 38.

[2] Exhibit 55, Appendix A.

On 6 March 1984, after considering the report of ICAO's investigation into the incident, the ICAO Council adopted a further resolution condemning the Soviet action. In the discussion, delegates condemned the action as a violation of the Chicago Convention, but not the Montreal Convention[2]. The resolution again specifically cited the Chicago Convention and did not mention the Montreal Convention[3].

If ICAO or the parties to the Montreal Convention (all of whom are members of ICAO) construed Article 1 of the Convention as applying to the actions of States against civil aircraft, the resolutions and debates leading to their adoption would have stated that the Montreal Convention, as well as the

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[1] Reports and Minutes, Exec. Comm., ICAO Assembly (24th sess., Sep. - Oct. 1983), ICAO Doc. 9409, pp. 10-15 (Exhibit 53); Minutes, ICAO Assembly (24th sess., Sep. - Oct. 1983), ICAO Doc. 9415, pp. 160-167 (Exhibit 54).

[2] Minutes, ICAO Council (111th sess., Feb. - Mar. 1984), ICAO Doc. 9441 (Exhibit 58).

[3] Exhibit 58, p. 106.

Chicago Convention, had been violated. The fact that the Montreal Convention was not relied upon reflects the understanding that it did not apply to such actions.

That conclusion is further supported by ICAO's response to the shootdown of Iran Air Flight 655. Although that incident was very different from the Israeli and Soviet shootdowns (in that it occurred while the USS Vincennes was defending itself during the course of active hostilities against what it believed was a military aircraft), it is noteworthy that none of the delegates, including the observer from Iran, mentioned the Montreal Convention during their discussions of Iran Air Flight 655[1]. Rather, as discussed below, many delegates urged the prompt ratification of Article 3 bis of the Chicago Convention, which expressly addresses unlawful interference by States. The resolution adopted by the Council on 17 March 1989 appealed to States to ratify Article 3 bis of the Chicago Convention, but did not mention the Montreal Convention.[1] Similarly, at the July 1988 Security Council discussion of the incident, no representative, including the representative of Iran, mentioned the Montreal Convention[2].

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[1] Minutes, ICAO Council (extra. sess., 13 July 1988), ICAO Doc. DRAFT C-Min. EXTRAORDINARY (1988)/1 (Exhibit 13); Minutes, ICAO Council (extra. sess., 14 July 1988), ICAO Doc. DRAFT C-Min. EXTRAORDINARY (1988)/2 (Exhibit 14); Minutes, ICAO Council (125th sess., 5 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/12 (Exhibit 15); Minutes, ICAO Council (125th sess., 7 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/13 (Exhibit 16); Minutes, ICAO Council (125th sess., 7 Dec. 1988, closed), ICAO Doc. DRAFT C-Min. 125/14 (Exhibit 17); Minutes, ICAO Council (125th sess., 14 Dec. 1988), ICAO Doc. DRAFT C-Min. 125/18 (Exhibit 18); Minutes, ICAO Council (126th sess., 13 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/18 (Exhibit 19); Minutes, ICAO Council (126th sess., 15 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/19 (Exhibit 20); Minutes, ICAO Council (126th sess., 17 Mar. 1989), ICAO Doc. DRAFT C-Min. 126/20 (Exhibit 21).

The response of ICAO to the use of force by States against international civil aviation has been to consider new international agreements that would address the problem. As is demonstrated above, neither ICAO nor any of its Members relied on the provisions of the Montreal Convention in condemning the 1973 and 1983 incidents. Instead, in 1973, and again in 1984, ICAO considered new proposals that would address the use of force by States against civilian aircraft.

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[1] Summary, ICAO Council (126th sess., 17 Mar. 1989), ICAO Doc. C-DEC 126/20 (Exhibit 22).

[2] Minutes, U.N. Sec. Council (2818th to 2821st meetings, July 1988), U.N. Docs. S/PV.2818 - S/PV.2821. Copies of these documents have been deposited in the Registry pursuant to Article 50 of the Rules of Court.

In August 1973, approximately six months after ICAO condemned Israel for deliberately shooting down a Libyan aircraft over the Sinai, Israeli military aircraft diverted and seized a Lebanese civilian airliner chartered by Iraqi Airways. Although Israel soon released the airliner, the ICAO Council met in extraordinary session and adopted a resolution stating, in part, that the Council "considers that these actions by Israel constitute a violation of the Chicago Convention[1]."

In the same resolution, the Council noted that the ICAO Assembly and a Diplomatic Conference on Air Law were about to meet concurrently in Rome. The Assembly was to consider proposals to amend the Chicago Convention to provide for enforcement of the obligations assumed by States under the Hague and Montreal Conventions (e.g., their obligation to prosecute or extradite individual offenders). The Conference was to consider new agreements to the same end. The Council recommended to the Assembly "that it include in its agenda consideration of these actions [by Israel] in violation of the Chicago Convention" and it recommended to the Conference that it "make provision in the conventions for acts of unlawful interference committed by States[1]." If Article 1 of the Montreal Convention already applied to such acts, then the Council's recommendation to the Conference to "make provision in the conventions" for such acts would have been unnecessary.

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[1] Action of the ICAO Council (extraordinary & 80th sess., Aug., Oct. - Dec. 1973), ICAO Doc. 9098, p. 57 (Exhibit 52).

The proceedings of the Assembly and Conference confirm the understanding that Article 1 of the Montreal Convention was understood not to apply to the actions of States against civil aircraft. After the Assembly discussed Israel's force-down of the Lebanese aircraft, it adopted Resolution A20-1, condemning the act as a violation of the Chicago Convention[1]. It then convened its Executive Committee to consider proposals to amend the Chicago Convention[2].

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[1] Exhibit 52, p. 57.

The Executive Committee initially had before it three proposals to amend the Chicago Convention to incorporate provisions of the Hague and Montreal Conventions[1]. Later, during the Executive Committee's discussions, Switzerland, France, and the United Kingdom jointly introduced an additional proposed amendment to the Chicago Convention regarding acts of unlawful interference by States "[t]o meet the wish of the ICAO

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[1] Res. A20-1, Resolutions and Plenary Minutes, ICAO Assembly (20th sess. - extra., Aug. - Sep. 1973), ICAO Doc. 9087, p.14 (Exhibit 48).

[2] Rule 15 of the Standing Rules of Procedure of the ICAO Assembly, states that the Committee consists of the Presidents of the Assembly and Council and the Chief Delegates of Contracting States. ICAO Doc. 7600/5 (Exhibit 41). It has jurisdiction to consider and report on any item of the Assembly's agenda that the Assembly refers to it. Ibid., Rule 15(e).

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[1] One proposal, by France, would have incorporated the operative provisions of the Hague Convention into the Chicago Convention, and provided that Article 94(b) of the Chicago Convention would apply. See Working Paper, ICAO Assembly (20th sess. - extra., Aug - Sept. 1973), ICAO Doc. A20-WP/2 (Exhibit 49). Therefore, any State that did not ratify the proposed amendment within one year would cease to be a member of ICAO. The other proposal, by the United Kingdom and Switzerland, would have amended the Chicago Convention so that (1) parties would be obligated to extradite or prosecute persons alleged to have committed acts defined as offenses by the Hague and Montreal Conventions, and to facilitate the continuation of the journey of the passengers and crew, and (2) Article 87 of the Chicago Convention would apply to States that the ICAO Council decided had not complied with these obligations, so that such States would not be allowed to operate their airlines through other States' airspace. Exhibit 49, ICAO Doc. A20-WP/3.

The third proposal, which Switzerland raised at the beginning of the Executive Committee meeting on behalf of it, France, and the United Kingdom, provided that Articles 1 to 11 of the Hague Convention and Articles 1 to 13 of the Montreal Convention would become part of the Chicago Convention when two-thirds of the parties to the Chicago Convention became parties to the other two Conventions. See Reports and Minutes, Exec. Comm., ICAO Assembly (20th sess. - extra., Aug - Sept. 1973), ICAO Doc. 9088, pp. 7-9 (statement of Switzerland) (Exhibit 50); Exhibit 49, ICAO Doc. A20-WP/4, p. 4 (text).

Council . . . [in] its resolution of 20 August[1]." That amendment would have required States not to interfere by force or threat of force with an aircraft of another State, subject to the provisions of the U.N. Charter, the Chicago Convention, and any agreement between the States concerned[2].

To guide the delegates' discussion of the proposals, the Chairman of the Committee prepared Questions of Principle. Question 3 stated "Does the Executive Committee wish to include, in the Chicago Convention, provisions of the Hague and Montreal Conventions?" Question 5 stated "Does the Executive Committee wish to include in the Chicago Convention provisions concerning acts of unlawful interference committed by States?[3]" The Committee voted yes to both Questions[4].

No delegate responded that Question 3 and Question 5 overlapped, or said that an affirmative answer to Question 3 would necessarily make Question 5 redundant, as they would have if the Montreal and Hague Conventions were understood to apply to the actions of States against civil aircraft. On the contrary, in discussing the Questions of Principle, the delegate of Egypt stated that the Committee "should not equate the failure of a State to act in conformity with the provisions of the Hague and Montreal Conventions with the commission by a State of an act endangering international civil aviation[1]." The delegate of Switzerland noted that those two Conventions "dealt with measures to be taken with respect to individuals who committed acts of unlawful interference[2]."

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[1] Exhibit 50, p. 8; see Exhibit 50, pp. 34, 60.

[2] Exhibit 49, ICAO Doc. A20-WP/15.

[3] Exhibit 49, ICAO Doc. A20-WP/14.

[4] Exhibit 50, pp. 59, 63-64.

The discussion within the Committee of the Swiss/French/UK proposal on unlawful interference was brief[3]. Again, no delegate stated that the proposal was unnecessary or redundant because of the Montreal Convention. On the contrary, in discussing the proposals in general, the Swedish delegate stated that "his delegation thought it quite appropriate for the ICAO Assembly or Council to consider the kinds of offences covered by the Hague and Montreal Conventions and also acts of unlawful interference with international civil aviation committed by States[1]."

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[1] Exhibit 50, p. 41.

[2] Exhibit 50, p. 41.

[3] Exhibit 50, pp. 117-119.

Thereafter, a working group prepared a draft resolution containing the text of a proposed amendment to the Chicago Convention. The proposed amendment incorporated the proposals and suggestions made during the Executive Committee debate into a proposed new Chapter XVI bis to the Chicago Convention. Several articles in the Chapter would have amended the Chicago Convention to include the obligations of States under the Hague and Montreal Conventions, thus subjecting States that violated those obligations to the enforcement measures provided for in the Chicago Convention[1].

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[1] Exhibit 50, p. 110 (emphasis added).

The draft Chapter XVI *bis* also included a provision, Article 79 *quater*, based on the Swiss/French/UK proposal on unlawful State interference with civil aviation. After a brief discussion of the Article, the Executive Committee approved it by a vote of 52 in favor, none opposed, and 39 abstaining[1]. As approved, the Article stated:

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[1] In particular, the Chapter included Article 79 *bis*, which said "When an act of unlawful seizure of an aircraft has been committed or when, due to the commission of an unlawful act against the safety of civil aviation, a flight has been delayed or interrupted," States must facilitate the continuation of the journey of the passengers and crew; Article 79 *ter*, which would have obligated States to report to the Council on acts of unlawful seizure of an aircraft, unlawful acts against the safety of civil aviation, action taken pursuant to Art. 79 *bis*, and measures taken by States with regard to the offender; and two articles (79 *quintum* and *sextum*) that would have incorporated Articles 1-11 of the Hague Convention and Articles 1-13 of the Montreal Convention into the Chicago Convention. Exhibit 49, ICAO Doc. A20-WP/30.

> "Each Contracting State undertakes to refrain from the use or threat of force against civil aircraft, airports or air navigation facilities of another State, subject to the provisions of the Charter of the United Nations and this Convention. This Article shall, in no event, be interpreted as legitimizing the use or threat of force in violation of the rules of international law[2]."

Consistent with the circumstances surrounding the development of this proposal, no delegate indicated that Article 79 quater was redundant, or would simply reproduce obligations already found in the Montreal or Hague Conventions. On the contrary, to the extent that the delegates addressed the point in their remarks, they expressly confirmed that the provision would go beyond the existing scope of those agreements.

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[1] Exhibit 50, pp. 145-146.

[2] Exhibit 50, pp. 143, 145. Upon the submission of the Executive Committee's report to the Assembly, the wording of the second sentence was amended in the Assembly to read "This Article shall not be interpreted as authorizing in any circumstances the use or threat of force in violation of the rules of international law." Exhibit 48, pp. 123-124.

For example, the Belgian delegate asked whether Article 79 bis was meant to apply "not only to acts of unlawful interference covered by the Hague and Montreal Conventions but also to an act committed by a State in contravention of Article 79 quater[1]." The French delegate replied that Article 79 bis would apply to all acts of interference with international civil aviation[2]. The Belgian delegate then pointed out that Article 79 ter would be broader than the corresponding reporting obligations in Article 11 of the Hague Convention and Article 13 of the Montreal Convention, since "the reporting obligation [of Article 79 ter] would cover also acts of unlawful interference committed by States[3]." The delegate from Barbados agreed that because they covered acts of State interference, Articles 79 bis and ter "were broader than the corresponding provisions in the Hague and Montreal Conventions[1]."

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[1] Exhibit 50, p. 131.

[2] Exhibit 50, p. 131.

[3] Exhibit 50, p. 132. The Belgian representative repeated this understanding of Article 79 ter just before the vote on the Article in the Assembly. Exhibit 48, p. 129.

The Executive Committee referred Chapter XVI bis to the Assembly[2]. There was no substantive discussion of Article 79 quater before the Assembly vote, which was 65 in favor, none opposed, and 29 abstentions[3]. Because it did not receive the necessary two-thirds majority of members of the Assembly, the Article was not approved.

On the last day of the Assembly, debate on Article 79 quater was reopened. In supporting the motion to reopen debate on the Article, the delegate from Bahrain stated that "he had been shocked by the failure of Article 79 quater, which covered a kind of unlawful interference with international civil aviation not dealt with in any existing conventions -- the use or threat of force by States against civil aircraft, airports and air navigation facilities[1]." Delegations proposed amendments to the Article, but it again failed to receive the two-thirds vote necessary for adoption[2].

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[1] Exhibit 50, pp. 133; see also ibid., p. 141 (statement of Syria noting that a difference between Articles 79 bis and ter and their counterparts in the Hague and Montreal Conventions was that the former "covered acts committed by States in contravention of Article 79 quater").

[2] Exhibit 48, p. 122.

[3] See Exhibit 48, p. 130.

Like the Assembly, the Conference focused on proposals to strengthen States' existing obligations under the Hague and Montreal Conventions. Although the Conference did not have before it proposals like Article 79 quater designed specifically to address interference by States with civil aviation, the delegates' statements nevertheless indicate that they understood the Hague and Montreal Conventions not to apply to actions of States against civil aircraft.

A draft convention proposed by Denmark, Finland, Norway, and Sweden would have allowed a State to convene the ICAO Council to consider possible violations by another State of its obligations under the Hague or Montreal Conventions, and would have provided that the Council could investigate the matter and make appropriate recommendations[1]. The proposal took the language defining violations directly from Article 1 of the Hague and Montreal Conventions. If that language were understood to cover State acts against civil aviation, the new convention would have covered the acts of States as well as of individuals. But the sponsors expressly said that their proposal did not extend to State interference with civil aviation. In introducing the convention, the Swedish delegate stated that it:

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[1] Exhibit 48, p. 134.

[2] Exhibit 48, p. 133-141.

> "established a machinery and a procedure for dealing with the failure of a State, after an act of unlawful interference had been committed or attempted, to take the sort of action required under the Hague and Montreal Conventions. . . . He would point out, in passing, that it would be fairly easy to extend it to cover acts committed by States, for which the Council, in its resolution of 20 August, had recommended that the Conference make provision[2]."

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[1] Minutes and Documents, ICAO International Conference on Air Law (Aug.- Sep. 1973), ICAO Doc. 9225, pp. 341-343 (Exhibit 51).

[2] Exhibit 51, p. 98.

The delegate of Finland later repeated that the proposal did not currently cover acts of unlawful interference by a State, although it could be amended to do so[1].

No delegate challenged this reading of the Hague and Montreal Conventions, or otherwise asserted that the Montreal Convention already covered acts of States against civil aviation.

Belgium complained that this proposal was too narrow, since it was limited to the legal obligations of the State under the Hague and Montreal Conventions, and introduced its own proposal[2]. The Belgian proposal would have allowed any State Party to complain to an ICAO Commission of Experts if it "considers that an act or omission on the part of another Contracting State constitutes a threat to the safety of international civil aviation[1]." The Belgian delegate explained that this provision "anticipat[ed] the recommendation made by the Council in its resolution of 20 August 1973[2]." Several delegates stated that the Belgian proposal was too vague[3], but none stated that the Montreal or Hague Conventions already covered certain acts by States against civil aviation.

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[1] Exhibit 51, p. 143.

[2] Exhibit 51, pp. 100, 367-380.

In the end, the Conference and the Assembly were unable to agree on any new conventions or amendments to the Chicago Convention.

At the September 1983 ICAO Council meeting on the Korean Air Lines incident, France proposed "a full and impartial enquiry" of the incident and put forward "technical proposals aimed at preventing a repetition of such events[4]." In addition, France requested "all States, through this Council, to adopt with the highest priority an amendment to the Convention on International Civil Aviation involving an undertaking by all Member States of the Organization to refrain from recourse to the use of force against civil aircraft subject to the provisions of the Charter of the United Nations[1]."

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[1] Exhibit 51, p. 369 (Article 3(1)). The Commission would then be able to investigate the allegation and make recommendations to States to "take the protective measures it deems necessary to ensure the security of international civil aviation to the exclusion of penal or coercive measures." Ibid., p. 370 (Article 3(6)).

[2] Exhibit 51, p. 101.

[3] See, e.g., Exhibit 51, p. 147 (statement of Argentina), p. 156 (statement of Mexico).

[4] Minutes, ICAO Council (Sep. 1983), op. cit., Exhibit 55, p. 10.

Many representatives spoke in support of the French proposal to amend the Chicago Convention[2]. In their statements of support, some representatives referred to the similar proposals raised in 1973 at the Rome Conference, and expressed their disappointment that those proposals had not been approved[3]. Notably, no representative referred to the Montreal Convention.

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[1] Exhibit 55, p. 10; see Working Paper, ICAO Council (extra. sess.), ICAO Doc. C-WP/7694 (text of French proposal with addendum) (Exhibit 56).

[2] See, e.g., Exhibit 55, pp. 14-15 (statement of Japan), p. 17 (statement of the Federal Republic of Germany), p. 29 (statement of Colombia), p. 31 (statement of Denmark), p. 53 (statements of Venezuela and the United States).

[3] Exhibit 55, p. 17 (statement of Nigeria), p. 21 (statement of Venezuela).

The Council agreed by consensus "to include in its work programme and examine with the highest priority the question of an amendment to the Convention on International Civil Aviation involving an undertaking to abstain from recourse to the use of force against civil aircraft[1]." The Council then voted to convene an extraordinary session of the ICAO Assembly to meet in 1984 to consider the amendment[2].

The ICAO Assembly met from 24 April to 10 May 1984. After discussion of ways to prevent unlawful interference by States with civil aircraft, the Executive Committee proposed that the Assembly approve a new Article 3 bis, which states in part,

> "The Contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision should not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations[3]."

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[1] Exhibit 55, pp. 53-54.

[2] Exhibit 55, pp. 55-56.

[3] Reports and Minutes, Exec. Comm., ICAO Assembly (25th sess. - extra., Apr. - May 1984), ICAO Doc. 9438, p. 3 (Exhibit 60); see Protocol Relating to an Amendment to the Convention on International Civil Aviation, signed at Montreal on 10 May 1984, ICAO Doc. 9436. See Exhibit 61.

The Assembly approved the proposal and submitted it to member States for ratification[1].

Again, neither the resolutions nor the discussion in ICAO stated that the Montreal Convention already covered acts by States against civil aircraft[2].

The fact that ICAO has never applied the Montreal Convention to acts of States against civil aviation, even when it has condemned those acts as contrary to international law, unequivocally confirms that the Montreal Convention does not address the actions of States against civil aircraft. When

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[1] Art. 3 bis has not yet entered into force although 61 States have ratified it. In accordance with para. 4(d), the Protocol shall come into force on the date of deposit of the 102nd instrument of ratification. (Exhibit 61). Neither the United States nor Iran had ratified Art. 3 bis at the time of the incident.

[2] A large number of delegates stated that the obligation for States not to use force against civil aviation already existed in general international law. Exhibit 60, p. 3 (statement of France), p. 19 (statement of the Republic of Korea), p. 22 (statement of Jamaica), p. 30 (statement of Canada), p. 36 (statement of Australia), p. 44 (statement of the United States), p. 45 (statement of the Netherlands), p. 47 (statement of Ireland), p. 61 (statement of Switzerland), p. 75 (statement of Brazil). None, however, suggested that the Montreal Convention was one of the sources of that obligation, much less stated that the provision simply incorporated Article 1 of the Montreal Convention into the Chicago Convention.

ICAO's affirmative steps to draft provisions in the Chicago Convention to provide for such action are also considered, it is clear that the subsequent practice with respect to the Montreal and Chicago Conventions demonstrates that Article 1 of the Montreal Convention does not apply to such State action.

Section III. The Montreal Convention Was Never Intended to Address the Actions of Military Forces Engaged in Active Hostilities.

As demonstrated above, the Montreal Convention was intended to prevent and deter saboteurs and terrorists from unlawfully interfering with civil aviation and endangering innocent lives. The drafters of the Convention did not discuss the actions of military forces acting on behalf of a State during hostilities, and there is no reason to believe that they intended the Convention to extend to such actions. Indeed, if the drafters had intended to address such actions, they would necessarily have had to address many other aspects of the actions of military forces during armed conflict.

The laws of armed conflict are firmly established in customary international law as a well-developed body of law separate from the principles of law generally applicable in times of peace[1].

One fundamental aspect of the laws of armed conflict is the inherent right of self-defense, recognized in Article 51 of the Charter of the United Nations[2]. This right includes the right of individual military units to defend themselves from attack. The conditions calling for the application of this inherent right of self-defense must be exercised in the judgment of the officers responsible for the safety of those military units and their personnel. The application of these laws of armed conflict does not depend on the recognition of the existence of a formal state of "war", but on whether an "armed conflict" exists[1]. Although it may be difficult to define in the abstract all of the circumstances that constitut an armed conflict, there is universal agreement that hostile operations carried out by military units of one country agains the military units of another (such as was occurring between the military forces of the United States and Iran at the time that Iran Air Flight 655 was downed) constitute an armed conflict[2].

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[1] See F. Kalshoven, Constraints on the Waging of War, p. 7 (1987) (Exhibit 77).

[2] Article 51 provides: "Nothing in the present Charter shall impair the inherent right of individual and collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." Following the events of 3 July 1988, the United States submitted a letter to the President of the Security Council reporting the actions that its military forces had taken in the exercise of its inherent right of self defense. Letter dated 6 July 1988 from the Acting Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, United Nations Document S/19989 (Exhibit 27).

The United States consistently applied the law of armed conflict, including the 1949 Geneva Conventions, to all of its hostile encounters with Iranian forces during this period. F example, Iranian crewmen captured during the incident involvin the Iran Ajr (see Annex 1) were accorded prisoner of war statu and were released to the Omani Red Crescent Society for their return to Iran.

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[1] International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Y. Sandoz, C. Swinarski, B. Zimmermann, eds.), pp. 39-40 (1987) (hereinafter the "ICRC Commentaries") (Exhibit 78); F. Kalshoven, op. cit., Exhibit 77, p. 27.

[2] ICRC Commentaries, op. cit., Exhibit 78, p. 40.

Infringements on the laws of armed conflict through international agreements primarily addressing situations other than armed conflict are not to be presumed. There is no indication that the drafters of the Montreal Convention intended it to apply to military forces acting in armed conflict. If they had so intended, they would have had to address a myriad of issues relating to acts by military forces. For example, the First Additional Protocol to the Geneva Conventions of 1949 applies to medical aircraft during armed conflict[1]. It addresses, inter alia, the status of medical aircraft in areas controlled by an adverse Party (Article 27), in areas not controlled by an adverse Party (Article 25), and in zones in which opposing forces are in contact (Article 26). It lists restrictions on the use of medical aircraft (Article 28), provides for means of notification of the aircraft's presence to a Party (Article 29), and provides for inspection of the aircraft by Parties to ensure that it is a medical aircraft acting in accordance with the Protocol (Article 30).

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[1] "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)", reprinted in 72 Am. J. Int'l Law (1978), pp. 457, 467-470 (Exhibit 79).

Similar provisions on identification, restrictions, notification, and inspection would have been required if the Montreal Convention had been intended to apply to acts by military forces in armed conflicts. Most obviously, the Convention would have had to address civilian aircraft that stray into combat zones, and under what conditions such aircraft were no longer protected by the terms of the Convention. Article 26 of the First Protocol, for example, states that medical aircraft flying over a combat zone "operate at their own risk" absent an agreement between the competent military authorities to the conflict[1]. Similarly, the 1923 Hague Rules of Aerial Warfare stated that if:

> "a belligerent commanding officer considers that the presence of an aircraft is likely to prejudice the success of the operations in which he is engaged at the moment, he

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[1] Exhibit 79, p. 468.

> may prohibit the passing of neutral aircraft in the immediate vicinity of his forces or may oblige them to follow a particular route. A neutral aircraft which does not conform to such directions, of which it has had notice issued by the belligerent commanding officer, may be fired upon[1]."

It is inconceivable that the drafters of the Montreal Convention, who never mentioned any of these issues, let alone addressed them in the Convention, intended it to apply to the actions of of the armed forces of States.

When, 14 years later, the ICAO Assembly drafted Article 3 bis of the Chicago Convention, discussed above, it was careful to include in the Article a statement that it "should not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations," which included the inherent right of self-defense. The participants at the Montreal conference would have included a similar provision if they had intended the Montreal Convention to modify the laws of armed conflict, and particularly if they had intended to address actions by military forces in armed conflict. There is no such provision in the Montreal Convention. Quite to the contrary, the only reference to military forces in the Convention is Article 4(1), a provision that effectively excludes from the definition of offenses actions directed at military aircraft.

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[1] *Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare*, pp. 255-256 (1923) (Exhibit 80).

The subsequent practice of States with respect to the Montreal Convention confirms that it was the understanding of ICAO and its member States that the Convention does not apply to actions of the armed forces of States. As noted above, ICAO did not condemn either the 1973 Israeli action or the 1983 Soviet action as a violation of the Convention. Nor did any delegation suggest during the extensive deliberations in ICAO that the pilots of the military aircraft involved violated the Convention. This practice simply confirms that the Convention was not intended and has not been understood to apply to actions taken by members of the armed forces of a State acting under military command.

There have been a number of instances since the Montreal Convention in which military aircraft have destroyed civilian aircraft in the context of an armed conflict[1]. The ICAO Council has never condemned any of these actions as violations of the Montreal Convention.

It is noteworthy that one of these incidents occurred in February 1986, during the Iran-Iraq War, when Iran reported that Iraqi fighters had shot down an Iranian civilian aircraft. In Iran's letters reporting the incident to the President of the ICAO Council and to the U.N. Secretary-General, Iran did not describe the action as a violation of the Montreal Convention, despite the fact that both it and Iraq were at the time parties to the Convention. Instead, it cited only the Chicago Convention[1].

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[1] *See*, *e.g.*, "Downed French Aircraft Found in Gaza Province", *FBIS*, 4 Aug. 1981, p. U1; "Government Confirms Role in French Plane Downing", *FBIS*, 5 Aug. 1981, p. U3 (French civilian airliner reportedly shot down by Mozambique in Mozambique airspace); "Iraqi Troops Push Back Iranians in Key Gulf Area", *N.Y. Times*, 21 Feb. 1986; "46 V.I.P. Died on Plane, Iran Says", *N.Y. Times*, 22 Feb. 1986, p. L+5 (Iran reported that Iraq shot down an Iranian civilian airplane); "Mozambique Downs Plane", *N.Y. Times*, 8 Nov. 1987, p. 26; "Communique Issued on Malawi Aircraft Incident, *FBIS*, 30 Nov. 1987, p. 10 (Air Malawi aircraft shot down by Mozambique). *See* Exhibit 35.

It is clear that from the plain meaning of the terms in their context and in light of the object and purposes of the Convention, the history of the Convention and subsequent practice of States in regard to it, not only that the Montreal Convention does not address the actions of States against civil aircraft, but also that the Convention was not intended in any way to affect or add to the laws of armed conflict.

As clearly demonstrated above in Part I, Chapter II, the actions of the United States upon which Iran's claims in this case rest were taken by the military forces of the United

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[1] Letter dated 10 Mar. 1986 from the Representative of the Islamic Republic of Iran to the ICAO Council President, ICAO Doc. PRES AK/106; Letter dated 20 Feb. 1986 from the Representative of the Islamic Republic of Iran to the Secretary-General, U.N. Doc. S/17850; Letter dated 25 Feb. 1986 from the Representative of the Islamic Republic of Iran to the Secretary-General, U.N. Doc. S/17863; Letter dated 5 Mar. 1986 from the Representative of the Islamic Republic of Iran to the Secretary-General, U.N. Doc. S/17896 (Exhibit 81).

States engaged in active hostilities with military forces of Iran. Under customary international law and relevant conventions, the actions of the parties in such a situation are governed by the laws of armed conflict.

It follows from the above that the Convention does not apply to the actions of the USS Vincennes on 3 July 1988. The actions of the United States that occurred in regard to the incident of 3 July 1988 were taken by the captain and crew of the USS Vincennes, with the authorization of the U.S. Commander of the Joint Task Force Middle East, while they were engaged in active hostilities provoked by Iranian armed forces. These were actions of the United States, and not of "persons" as contemplated by Article 1.

It is clear that the Montreal Convention was not intended to address such actions, whether under Article 1, prohibiting certain actions by individuals, or under Articles 3 and 10(1), imposing certain affirmative obligations on Contracting States in regard to such individuals[1]. (Again, this is not a situation where individual terrorists might have been covertly directed or assisted by a State.)

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[1] The formal investigation by United States military into the circumstances surrounding the downing of Iran Air Flight 655 included an investigation into and recommendations regarding possible disciplinary and administrative action against any United States naval personnel associated with the incident. Based upon an exhaustive analysis of all of the available information, that investigation concluded that no disciplinary or administrative action should be taken. ICAO Report, Appendix E, p. E-55. In approving the recommendations regarding disciplinary and administrative action, the U.S. Chairman of the Joint Chiefs of Staff stated:

> "It is my view that, understanding the entire context, reasonable minds will conclude that the Commanding Officer did what his nation expected of him in the defense of his ship and crew. This regrettable accident, a by-product of the Iran-Iraq war, was not the result of culpable conduct onboard VINCENNES."

Ibid., p. E-70.

PART V

THE TREATY OF AMITY PROVIDES NO BASIS FOR JURISDICTION IN THIS CASE

In its Memorial, Iran asserts for the first time that the 1955 Treaty of Amity between Iran and the United States constitutes an additional basis of jurisdiction for the Court[1]. Iran's inclusion of the Treaty of Amity in its Memorial as a basis of jurisdiction is striking because Iran, through its words and actions, for many years has consistently treated this Treaty as no longer in force. Nevertheless Iran expects this Court to ignore Iran's previous conduct under the Treaty and accept that it is "entitled to invoke its provisions[2]." The United States is compelled to bring to the Court's attention Iran's prior conduct with respect to its obligations under this Treaty, which shows that Iran is now asserting in bad faith its rights under the compromissory clause of the Treaty of Amity.

In the case concerning *United States Diplomatic and Consular Staff in Tehran*[3], the United States filed an Application before this Court asserting that it had jurisdiction *inter alia* under Article XXI of the Treaty of Amity, the same basis of jurisdiction now pled by Iran in this case. The Government of Iran informed the Court that the United States' claims were not properly before the Court; indeed, Iran did not even appear before the Court in that case[1]. When the Court ultimately rendered its judgment, Iran did not comply with it. Now Iran expects this Court to allow Iran to bring the United States before the Court on the basis of the very same compromissory clause of the Treaty of Amity. This manifest abuse of its obligations under the Treaty should bar Iran from prevailing now in asserting its rights under the Treaty. As Sir Hersch Lauterpacht has written:

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[1] Iranian Memorial, para. 2.72.

[2] Iranian Memorial, para. 2.77.

[3] *1980 I.C.J. Reports*, p. 3.

> "A State cannot be allowed to avail itself of the advantages of the treaty when it suits it to do so and repudiate it when its performance becomes onerous. It is of little consequence whether that rule is based on what in English law is known as the principle of estoppel or the more generally conceived requirement of good faith[2]."

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[1] *Ibid.*, pp. 18-19.

[2] Special Rapporteur Lauterpacht, "Report on the Law of Treaties", II Y.B. Int'l L. Comm'n, p. 90 at p. 144 (1953) (Exhibit 82); *accord*, *Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962*, p. 6, at p. 32; *Arbitral Award Made by the King of Spain on 23 December 1906, Judgment, I.C.J. Reports 1960*, p. 192, at p. 213. *See generally* I.C. MacGibbon, "Estoppel in International Law", 7 *Int'l & Comp. L.Q.*, p. 468 (July 1958).

Equally, a state cannot repudiate a treaty when it suits it to do so, and then assert it when it appears to be a useful basis of jurisdiction.

In a variety of cases before the Iran-U.S. Claims Tribunal, Iran also has asserted that the Treaty of Amity was terminated long before the incident of 3 July 1988. The Tribunal has rejected Iran's assertion and found that the Treaty was in force at the time the claims before it arose, that is, prior to January 1981, but never passed on the question of the Treaty's continuing validity after that time[1].

Nonetheless, the United States will not similarly engage in this type of manipulation by reversing its own past positions and asserting before this Court that the Treaty is not now in force between the United States and Iran, even though the previous decisions of the Court and the Claims Tribunal do not foreclose that possibility. In light of Iran's conduct, however, Iran is barred from now invoking the compromissory clause of the Treaty of Amity. At a minimum, in light of

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[1] *See, e.g.*, *Phelps Dodge v. Iran*, Award No. 217-99-2, at p. 15 (19 Mar. 1986) ("No Party contends that the Treaty was ever terminated in accordance with its terms, but the Respondent suggests that the Treaty has been terminated by 'implication' as a result of economic and military sanctions imposed on Iran by the United States in late 1979 and 1980"); *Amoco International Finance Corp. v. Iran*, Award No. 310-56-3, at pp. 38-39 (14 July 1987) (Exhibit 84).

Iran's conduct, it is appropriate for the Court to be rigorous in determining whether Iran's sudden introduction of this Treaty as a basis of jurisdiction is sustainable.

The United States maintains that the Treaty does not provide such a basis for jurisdiction. First, by invoking the Treaty of Amity in its Memorial, Iran is seeking to transform the dispute brought before the Court in the Application into another dispute which is wholly different and much more expansive in character. Second, the Treaty of Amity is wholly irrelevant to the dispute that is the subject of Iran's Application. Third, as was the case for the compromissory clause of the Montreal Convention, Iran has made no effort to adjust by diplomacy its alleged dispute under the Treaty, as is required by the Treaty.

CHAPTER I

IN INVOKING THE TREATY OF AMITY IN ITS MEMORIAL, IRAN IS TRANSFORMING THE DISPUTE BROUGHT BEFORE THE COURT IN ITS APPLICATION INTO ANOTHER DISPUTE WHICH IS WHOLLY DIFFERENT AND MUCH MORE EXPANSIVE IN CHARACTER.

In its Memorial, Iran for the first time asserts the 1955 Treaty of Amity as a basis of the Court's jurisdiction[1]. Throughout Iran's efforts at the United Nations and ICAO to obtain condemnation of the United States for the incident of 3 July 1988, Iran never once asserted that the United States had violated the Treaty of Amity. In its Application, Iran neither referred to this treaty as a basis for jurisdiction nor asserted any claims arising under the treaty. Iran should not be permitted to raise the Treaty of Amity now.

In proceedings instituted by means of an Application pursuant to Article 40 of the Statute of the Court, the jurisdiction of the Court is founded upon the legal grounds specified in that Application. Article 38 of the Court's Rules requires that the Application "specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based." Iran asserts that after the filing of the

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[1] Iranian Memorial, para. 2.72.

Application an additional ground of jurisdiction may be brought to the Court's attention and may be taken into account by the Court; Iran supports this by citing to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment* (hereinafter *Nicaragua, Jurisdiction*)[1].

By introducing the Treaty of Amity in its Memorial, Iran in fact is transforming the dispute with respect to that Treaty into another dispute which is wholly different in character from that presented to the Respondent when it first appeared before the Court in this matter. In its Application, Iran stated that the facts of this case arose from a single incident: the destruction of an Iranian aircraft by a United

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[1] *I.C.J. Reports 1984*, p. 392, at pp. 426-427. Iran misinterprets the Court's ruling in the *Nicaragua, Jurisdiction* case. Although it is possible under the Statute and Rules of the Court for "the parties to transform the character of the case" through amendments in both their submissions, *Societe Commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 160, at p. 173, it is not possible for one party to unilaterally transform the case in the face of an objection by the other party. The decision in *Nicaragua, Jurisdiction* recognized this when it stated that additional grounds may not be taken into account if the result is "to transform the dispute brought before the Court by the application into another dispute which is different in character." *I.C.J. Reports 1984*, p. 427.

States warship[1]. Based on these facts, Iran requested a judgment from this Court on three points. First, Iran asked this Court to decide that "the ICAO Council decision" of 17 March 1989, regarding the destruction of the aircraft was erroneous. Second, Iran asked this Court to decide that the United States had violated the Montreal Convention by destroying the aircraft. Third, and finally, Iran asked to Court to declare that the United States is responsible to pay compensation to the Islamic Republic, in the amount to be determined by the Court, for these violations. Iran made absolutely no claim in its Application that the United States infringed upon its rights of commerce or navigation.

In its Memorial, however, Iran goes far beyond its initial factual statement to assert a new argument under the Treaty of Amity. No longer does Iran focus solely on the shootdown of Iran Air Flight 655, nor on the issue of the lawful use of force, but instead expands its complaint to cover the effect of U.S. military deployments in the Gulf, and of other U.S.

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[1] Iranian Application, section I.

actions not involving military force, on the commerical relations of Iran and the United States over an extended period of time.

In the Memorial's statement of facts, Iran discusses in depth the deployment of U.S. forces to the Gulf, the issuance of certain notices to airmen, the U.S. economic sanctions against Iran, and the "U.S. interference in civil aviation" in the Gulf, particularly involving Iranian aircraft[1]. None of these alleged factual matters are the basis of the claims set forth in Iran's Application.

Iran then discusses in its Memorial the applicable principles and rules of law in the case. In this section, with respect to the alleged failure to accord "fair and equitable treatment" under Article IV(1) of the Treaty, Iran refers to the "obligation not to interfere repeatedly with Iranian commercial aircraft[2]." With respect to the alleged failure under Article VIII to afford unrestricted trade, Iran states that this Court "has already held that the imposition of a general trade embargo violates the terms of a similar treaty provision calling for freedom of commerce[1]." In discussing the alleged violation of Articles IV(1) and X(1), Iran states that "the question arises in the context of this case whether repeated interferences with civil and commercial aircraft by one State's military forces, resulting in the destruction of a commercial airliner over the internal and territorial waters of the other State, is any less of a violation of Articles IV(1) and (X)1 of the Treaty of Amity[2]." Iran's application of the Treaty of Amity to the actual incident of 3 July 1988 is at best cursory. In stretching to find legal principles in the Treaty that connects it to the incident, Iran is reduced to introducing an entirely new factual element never discussed before by Iran relating to "the Islamic Republic's ability to purchase a replacement aircraft[3]."

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[1] Iranian Memorial, paras. 1.36 - 1.57.

[2] Iranian Memorial, para. 3.66

In its section that purports to apply the law to the facts, Iran cites only one article of the Treaty of Amity, in a subsection entitled "The Deployment and Conduct of the U.S. Fleet in the Persian Gulf." According to Iran, this subsection deals with "the deployment and conduct of the U.S. fleet in the

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[1] Iranian Memorial, para. 3.66

[2] Iranian Memorial, para. 3.68.

[3] Iranian Memorial, para. 3.65.

Persian Gulf leading up to the incident"; this subsection is to be distinguished from the section dealing with "the actual shooting down of Iran Air Flight 655[1]." Iran asserts that, under Article X(1) of the Treaty, the United States breached its obligation "to guarantee to the Islamic Republic freedom of commerce and navigation[2]." Likewise in its submissions to the Court, Iran pays lip service to the idea that the shooting down of Iran Air Flight 655 was a violation of Articles IV(1) and X(1) of the Treaty of Amity[3], but is much more thorough in its description of the alleged Treaty violations completely outside the context of the shootdown. The eighth submission states:

> "[T]he United States, in stationing its warships in the Persian Gulf within the Islamic Republic's internal waters and territorial sea and in the international waters, and in issuing and operating under the NOTAMs discussed herein, has violated its legal obligations to the Islamic Republic to guarantee freedom of commerce and navigation under Article X(1) of the Treaty of Amity."

In raising the Treaty of Amity, Iran has departed entirely from the shootdown of Iran Air Flight 655 to try to establish that

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[1] Iranian Memorial, para. 4.01.

[2] Iranian Memorial, para. 4.12.

[3] Iranian Memorial, fourth submission, p. 292.

U.S. military forces in the Gulf over a long period of time threatened and hindered commercial activities in violation of the Treaty of Amity.

Furthermore Iran seeks to depict the shootdown of Iran Air Flight 655 itself as some form of interference with commercial relations between the United States and Iran in the sense contemplated by the Treaty of Amity. In doing so, Iran is trying to transform this dispute from one that involves a single incident involving the use of force, and that incident's relation to two aviation conventions, into a dispute that attempts to implicate U.S.-Iran commercial relations throughout the Gulf War.

In *Military and Paramilitary Activities in and against Nicaragua*, the Court permitted the Applicant to plead an additional basis of jurisdiction after the filing of the Application. In that case, however, Nicaragua only asserted that the Treaty of Friendship, Commerce, and Navigation (FCN) had been violated "by the military and paramilitary activities of the United States in and against Nicaragua, *as described in*

Nicaragua's Application[1]". Not only did the Application in that case describe the activities that the Memorial alleged violated the FCN Treaty (the mining of Nicaraguan ports and territorial waters, attacks on Nicaragua's airports, and military operations that endanger and limit trade and traffic on land), but the Application itself specifically alleged that the United States had infringed the "freedom of the high seas" and interrupted "peaceful maritime commerce[2]." Consequently, in its Memorial Nicaragua argued that the FCN Treaty was "a complementary foundation for the jurisdiction of the Court . . . insofar as the Application of Nicaragua implicates violations of provisions of the Treaty[3]."

In the present case, Iran is now raising factual circumstances and allegations of conduct (i.e. interference with commerce) that are in no way reflected in Iran's

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[1] *Nicaragua, Jurisdiction*, Memorial of Nicaragua, para. 165 (emphasis added).

[2] *Military and Paramilitary Activities in and against Nicaragua*, Application of Nicaragua, para. 26(e).

[3] *Nicaragua, Jurisdiction*, Memorial of Nicaragua, para. 164

Application. It is understandable that Iran feels compelled to introduce activities other than the shootdown of Iran Air Flight 655, since the incident of 3 July 1988 is not the type of situation addressed by the Treaty of Amity. Nevertheless, Iran cannot be permitted to so deviate from the factual and legal basis stated in its Application so as to transform the nature of this dispute. The new Iranian cause of action would of necessity require an examination of the entire pattern of military actions during the Iran-Iraq War, the details and justification for the alleged U.S. commercial embargo, and the circumstances concerning civil air operations in the area during this entire period. To allow such a departure from the basis of fact and law established in the Application would threaten the ability of this Court to maintain an orderly judicial process.

CHAPTER II

THE TREATY OF AMITY IS WHOLLY IRRELEVANT TO THE DISPUTE THAT IS THE SUBJECT OF IRAN'S APPLICATION.

The true subject of Iran's Application and Memorial is the incident of 3 July 1988 as it relates to the lawful use of force; that incident, however, is wholly irrelevant to the Treaty of Amity. As this Court held in Ambatielos, "[i]t is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty" upon whose compromissory clause it relies[1]. Iran must establish a reasonable connection between the Treaty of Amity and its claim against the United States for the incident of 3 July 1988. Iran has failed to do so.

The Treaty of Amity is concerned with the commercial relationship between the two countries and their nationals, not with damages resulting from an incident involving armed force between the two Parties. In Article XX(1)(d), the Treaty explicitly states that it "shall not preclude the application of measures . . . necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, *or necessary to protect its essential security interests*" (emphasis added). As stated in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment* (hereinafter *Nicaragua, Merits*), this Court "cannot entertain . . . claims of breach of specific articles of the treaty, unless it is first satisfied that the conduct complained of is not 'measures . . . necessary to protect' the essential security interests of the United States[1]."

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[1] Ambatielos, Merits, Judgment, I.C.J. Reports 1953, p. 10, at p. 18.

Action taken in self-defense is without question a part of the category of measures "necessary to protect" essential security interests[2]. The USS *Vincennes* was engaged in self-defense against armed attack at the time of the incident of 3 July 1988, and perceived itself to be under an armed attack from a hostile approaching aircraft. As the ICAO Investigation report concluded: "The aircraft was perceived as a military aircraft with hostile intentions . . . ."[1] Consequently, on the facts as pled by Iran, the Court is presented with exactly the type of situation the Treaty of Amity does not cover.

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[1] *I.C.J. Reports 1986*, p. 14, at p. 136.

[2] *I.C.J. Reports 1986*, p. 117 ("It is difficult to deny that self-defence against an armed attack corresponds to measures necessary to protect essential security interests.").

In Nicaragua, Merits, the Court was not faced with a situation involving self-defense against a perceived imminent armed attack. In assessing allegations that the United States had engaged in mining of ports and direct attacks on ports and oil installations, the Court determined that such actions, even if not acts of self-defense against armed attack, might still implicate essential security interests if "the risk run by these 'essential security interests' is reasonable, and secondly, whether the measures presented as being designed to protect these interests are not merely useful but 'necessary.'"[2] In the context of the facts of that case, the

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[1] ICAO Report, para. 3.2.1.

[2] Nicaragua, Merits, I.C.J. Reports 1986, p. 117.

Court found that there was no threat to the United States' essential security interests necessitating the mining of ports and attacks on ports and oil installations[1].

Furthermore, even a cursory review of the operative articles of the Treaty of Amity discussed by Iran shows that these articles have no reasonable connection to the incident of 3 July 1988. Although in its Memorial Iran discusses different articles of the Treaty[2], the only articles upon which Iran ultimately bases its claims in its Submissions to the Court are Articles IV(1) and X(1) of the Treaty of Amity[3].

Article IV(1) provides:

> "Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws."

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[1] Ibid., pp. 141-142.

[2] Iranian Memorial, paras. 3.62-3.68.

[3] Iranian Memorial, Submissions, pp. 292-293.

This article must be read in the context of Articles II and III of the Treaty, which provide for the rights of nationals and companies of one Party to enter and remain in the territory of the other Party for the purpose of conducting commercial activities. Article IV(1) then provides a general principle by which the host Party must treat these nationals and companies: a principle that is designed to preclude host State actions that would impair ownership and managerial control, and to permit the vindication of contractual rights. It cannot, and should not, be read as a wholesale warranty by each Party to avoid all injury whatsoever to the nationals and companies of the other Party regardless of location and regardless of whether the injury relates to commercial activities. In Nicaragua, Merits[1], the Court refused to read into the FCN Treaty a rule that a State binds itself "to abstain from any act toward the other party which could be classified as an unfriendly act, even if such an act is not in itself the breach of an international obligation." Iran has not alleged and cannot allege that there has been discriminatory treatment against Iranian nationals or companies. It bears noting that in *Nicaragua, Merits*, this Court did not reach the issue of whether the United States had violated the obligation to accord "equitable treatment" since the evidence did not demonstrate that the acts alleged to have violated that obligation could be imputed to the United States[1]. Thus Article IV(1) has no reasonable connection to the incident of 3 July 1988.

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[1] Nicaragua, Merits, I.C.J. Reports 1986, pp. 136-137.

Article X(1) provides that "Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation." Iran's claim as stated in both the Application and in its Memorial does not involve commerce "between the territories of" the United States and Iran. Furthermore, Iran's claim does not in any fashion state a course of action on the part of the United States to hinder the freedom of maritime commerce. This is to be contrasted with the claims presented in *Nicaragua, Merits*, in which the Court found that there had been a hindering of the right of access to Nicaraguan ports by the laying of mines in early 1984 close to various ports[1].

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[1] *Ibid.*, pp. 138-139.

Thus, taking Iran's claims under the Treaty of Amity as relating only to the incident of 3 July 1988, these claims cannot sustain the jurisdiction of the Tribunal under that Treaty, since they are wholly irrelevant to the subject matter contemplated by the Treaty.

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[1] Ibid., p. 139.

CHAPTER III

IRAN MAY NOT INVOKE THE COMPROMISSORY CLAUSE OF THE TREATY OF AMITY BECAUSE IT HAS MADE NO EFFORT TO RESOLVE BY DIPLOMACY ANY DISPUTES UNDER THE TREATY OF AMITY.

The United States showed in Part IV, Chapter I, that from the time of the incident of 3 July 1988, until Iran's Application was filed in this case, Iran never requested to meet with U.S. officials to discuss, negotiate, or arbitrate this matter. Iran could have approached the United States through any number of channels, including the frequent contact of U.S. and Iranian lawyers at the Iran-U.S. Claims Tribunal in The Hague. Moreover, from 3 July 1988 to the filing of its Application with this Court, Iran made no effort to respond in any meaningful fashion to attempts by the United States to make compensation to the families of the victims of Iran Air Flight 655.

Nevertheless, Iran asserts that this Court has jurisdiction pursuant to the compromissory clause of the Treaty of Amity. Article XXI of the Treaty states:

> "1. Each High Contracting Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other High Contracting party may make with respect to any manner affecting the operation of the present treaty.

> 2. Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

(Emphasis added.)

This compromissory clause is common to the bilateral investment treaties negotiated by the United States in the post-World War II era. The structure provides that two conditions must be fulfilled in order to open the way to recourse to the Court. First, there must be a dispute between the Parties as to the interpretation and application of the Treaty. Second, it must be the case that the dispute has not been "satisfactorily adjusted by diplomacy."

Neither condition has been fulfilled. It cannot be said that there is a dispute between Iran and the United States when Iran has never approached the United States and asked for the relief sought from this Court under the Treaty of Amity. Even if one believes that there is a dispute between the parties that can somehow be fit into the terms of the Treaty, Iran likewise has not in any way fulfilled the second condition. Iran's allegations must have been the subject of negotiations of some kind prior to the institution of these proceedings for this Court to conclude that the dispute has not been "satisfactorily adjusted by diplomacy."

Iran would like to use this Court's ruling in *Nicaragua, Jurisdiction* to support its position, but Iran fails to note critical differences with the dispute now before the Court. In *Nicaragua, Jurisdiction*, the Court held that "it does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty[1]." In that case, there were, however, bilateral talks between the United States and Nicaragua, as well as multilateral discussions in the Contadora Group, over their general differences[2]. In the present case, however, Iran not only did not discuss with the United States alleged violations of the Treaty of Amity, it never entered into any discussions or negotiations whatsoever relating to the incident of 3 July 1988, prior to the filing of its Application.

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[1] *I.C.J. Reports 1984*, p. 428.

[2] *Nicaragua, Jurisdiction*, Counter-Memorial of the United States, para. 182 and footnote.

The purpose in limiting the reference of disputes to this Court to only those that are "not satisfactorily adjusted by diplomacy" is to ensure that the parties first attempt to resolve matters directly through diplomatic discussion. It is only through diplomatic negotiations or discussions of some kind that the respondent State can learn of, and either accept or reject, the basic legal and factual assertions of the complainant State. It is the essence of the concept of dispute resolution that discussions between the interested States should precede the institution of proceedings before the Court because such discussions or the adjustment by diplomacy fix the points of fact and law over which the Parties disagree.

In assessing its jurisdiction under this same treaty in United States Diplomatic and Consular Staff in Tehran[1], this Court found critical the fact that the United States had tried to negotiate with Iran and that Iran had refused to enter into any discussion of the dispute. In that case, the United States offered to send a former Attorney General of the United States,

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[1] I.C.J. Reports 1980, p. 3.

Mr. Ramsey Clark, to Iran to deliver a message from the President of the United States to the Ayatollah Khomeini; Mr. Clark was authorized to discuss all avenues for resolution of the crisis. Although the Government of Iran initially agreed to receive Mr. Clark in Tehran, it subsequently refused to do so. Shortly thereafter, Tehran radio broadcast a message from the Ayatollah Khomeini stating that no Iranian officials could meet with U.S. officials. All other efforts by the United States to make contact were rebuffed as well[1]. Under these circumstances, the Court stated, "[i]n consequence, there existed at [the date of the Application] not only a dispute but, beyond any doubt, a 'dispute . . . not satisfactorily adjusted by diplomacy' within the meaning of Article XXI, paragraph 2, of the 1955 Treaty. . . .[2]"

The circumstances in this case are just the opposite. Iran has made no effort to approach the United States on this matter and has ignored U.S. efforts to discuss compensation for the incident and to pay such compensation. Therefore the Court should reject Article XXI as a basis for its jurisdiction in this case.

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[1] United States Diplomatic and Consular Staff in Tehran, U.S. Memorial, pp. 24-25.

[2] I.C.J. Reports 1980, p. 27.

SUBMISSION

The United States of America requests that the Court uphold the objections of the United States to the jurisdiction of the Court.

4 March 1991

Edwin D. Williamson
Agent of the United States
of America

ANNEX 1

IRANIAN ATTACKS ON INNOCENT SHIPPING
DURING THE IRAN-IRAQ WAR

In the Statement of Facts, the United States noted that the Government of Iran conducted extensive attacks against innocent shipping during the Iran-Iraq war. These ships, which were travelling on the high seas to and from non-Iraqi ports, were almost never stopped and searched by Iran to determine whether they were trading with Iraq or carrying contraband destined for Iraq. The following is a description of some of the Iranian attacks against shipping primarily in the 18 months preceding the incident of 3 July 1988. The Court may also wish to refer to the reports of the Secretary General pursuant to U.N. Security Council Resolution 552 of 1 June 1984 (Exhibit 32).

Section I. Iranian Gunboat Attacks Caused Extensive Damage to Merchant Vessels and the Deaths of Numerous Merchant Seamen.

Iran predominantly attacked merchant vessels by using small gunboats, typically equipped with machine guns, rocket launchers (including rocket-propelled grenades), and small arms. For instance, throughout 1987, Iranian gunboats conducted extensive, unprovoked attacks on ships of various nations, causing extensive damage and the deaths of numerous merchant seamen. The more egregious attacks are as follows.

On 26 February 1987, Iranian gunboats attacked a Chinese cargo vessel, leaving four crewmen dead[1]. Off the coast of the United Arab Emirates, on 12 March 1987 a Saudi-registered tanker Arabian Sea was attacked by missiles launched from an Iranian vessel, while on 28 March 1987, the Singapore-registered tanker Sedra was attacked by what appeared to be an Iranian gunship using a Seakiller missile; at least seven seamen were killed[2]. On 29 March 1987, Iranian gunboats attacked a Singaporean-registered tanker, killing at least eight crew members[3].

On 4 May 1987, an Iranian gunboat fired on a Panamanian-flagged tanker, the Petrobulk Regent, that had left Kuwait. One member of the tanker's crew was wounded in the attack[4]. On 5 May 1987, the Japanese-registered Shuho Maru was attacked by an Iranian gunboat; the next day the Soviet cargo ship *Ivan Korotoyeu* was attacked with rockets by Iranian patrol boats in the southern Persian Gulf, suffering moderate damage[1]. On 11 May 1987, Iranian gunboats attacked the Kuwaiti-bound, Indian-registered *B.R. Ambedkar* off the coast of the United Arab Emirates[2]. On 18 May 1987, an Iranian ship attacked the Liberian-registered tanker *Golar Robin* en route to Kuwait[3]. On 22 May 1987, Iranian revolutionary guard units attacked and seriously damaged the Qatar-registered tanker *Rashidah* northwest of Bahrain[4].

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[1] Exhibit 32, S/16877/Add.5, p. 4.

[2] Exhibit 32, S/16877/Add.5, p.5; "7 Killed in Attack on Gulf Tanker", Wash. Post, 29 Mar. 1987, p. A-21.

[3] "Iranian gunboat attacks tanker in Persian Gulf", Christian Science Monitor, 30 Mar. 1987, p. 2.

[4] "Gunboat Attacks Tanker Carrying Kuwaiti Oil", FBIS, Middle East & South Asia Review, 6 May 1987, p. C1; Exhibit 32, S/16877/Add.5, p.6.

On 26 and 30 June 1987 respectively, Iranian gunboats attacked the Norway-registered *Mia Margrethe* and Kuwait-registered *Al Mergaab*[5]. On 9 and 13 July 1987 respectively, Iranian gunboats attacked the Liberian-registered Peconic and French-registered Ville D'Anvers[1]. By 3 August 1987, the Iranian Navy was conducting "Martyrdom Maneuvers" which involved training suicide squads to ram warships with explosive-laden speedboats[2]. On 18 August 1987, two Iranian gunboats attacked the Liberian-registered Osco Sierra outside the Strait of Hormuz[3].

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[1] Exhibit 32, S/16877/Add.5, p. 6; "Soviet Ship Attacked by Iran in Gulf, U.S. Says", *N.Y. Times*, 9 May 1987, p. 1.

[2] "Iran Raids Tanker in the Gulf and Again Threatens Kuwait", *N.Y. Times*, 12 May 1987, p. A-8; Exhibit 32, S/16877/Add.5, p. 7.

[3] "Iranian Ship Attacks Liberian Tanker off Kuwait", *FBIS*, Near East & South Asia Review, 19 May 1987, p. C1; Exhibit 32, S/16877/Add.5, p.7.

[4] "Missiles Hit Qatari Freighter off Bahrain", *FBIS*, Middle East & South Asia Review, 22 May 1987, p. C1; Exhibit 32, S/16877/Add.5, p.7.

[5] Exhibit 32, S/16877/Add.5, p.8.

On 3 September 1987, Iranian gunboats attacked the Japanese-registered Nisshin Maru with rocket-propelled grenades and the Italian-registered Jolly Rubino with bazookas[4]. On 10 September 1987, Iranian gunboats raked the Cypriot-registered Haven with rocket and machine gun fire.[5] On 20 September 1987 an Iranian speedboat attacked the Saudi-registered tanker

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[1] "Hit Ship is Liberian-Owned", Wash. Post, 11 July 1987, p A-19; Exhibit 32, S/16877/Add.5, p.8.

[2] "U.S. Plans to Send Elite Units to Gulf", Wash. Post, 5 Aug. 1987, p. A-1; "Iran Concludes Naval Exercises", Wash. Post, 8 Aug. 1987, p. A-13 (Exhibit 35).

[3] "Iran Said to Attack Ship in Gulf of Oman", Wash. Post, 19 Aug. 1987, p. A-1; Exhibit 32, S/16877/Add.5, p.9.

[4] "Iran, Iraq Attack More Gulf Ships", Wash. Post, 4 Sep. 1987, p. A-1; Exhibit 32, S/16877/Add.5, pp. 10-11.

[5] "Gulf Foes Attack on Land and Sea", Wash. Post, 11 Sep. 1987, p. A-27.

Petroship B in the Strait of Hormuz[1]. On 7 October 1987, an Iranian speedboat attacked the Saudi-registered tanker *Raad Al-Bakry VIII*[2]. On 14 October 1987, Iranian gunboats attacked the Liberian-registered tanker *Atlantic Peace* off Dubai[3]. Iran used rocket launched grenades to hit the Panamanian-registered *Prosperventure L* off the United Arab Emirates on 23 October 1987[4]. On 23 November 1987, Iranian speedboats attacked the Romanian-registered cargo ship *Fundulea*, seriously injuring three crew members, and the Panamanian-registered container ship *Uni-Master*[5]. On 26 November 1987, an Iranian speedboat off Dubai attacked the Romanian oil tanker *Dacia*[6].

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[1] "Arab League Postpones Move Against Iran", *Wash. Post*, 21 Sep. 1987, p. A-20; Exhibit 32, S/16877/Add.5, p. 11.

[2] "Iranian Boat Attacks Saudi Tanker in Dubayy", *FBIS*, 7 Oct. 1987, p. 14; Exhibit 32, S/16877/Add.5, p. 13.

[3] "New Raids by Iran and Iraq are Reported in Gulf", *N.Y. Times*, 15 Oct. 1987, p. A-7; Exhibit 32, S/16877/Add.5, p.14.

[4] *N.Y. Times*, Oct. 25, 1987; Exhibit 32, S/16877/Add.5, p. 14.

[5] "Iran Strikes Panamanian, Romanian Vessels", *FBIS*, Near East & South Asia, 24 Nov. 1987, p. 34; Exhibit 32, S/16877/Add.5, p. 16.

[6] "Iranian Speedboat Attacks Romanian Tanker", *FBIS*, Near East & South Asia, 27 Nov. 1987, p. 19.

In early December 1987, Iranian gunboats hit, set ablaze, and sank the Singapore-registered Norman Atlantic, and attacked the Danish-registered tanker Estelle Maersk[1]. On 18 December 1987, an Iranian gunboat opened fire on the Liberian-registered supertanker Saudi Splendor off Dubai and the Norwegian-registered tanker Happy Kari in the Strait of Hormuz[2]. On 23 December, Iranian gunboats attacked and set ablaze the Norwegian-registered tanker Berge Big[3].

Several nations took steps to protect their shipping. After the 13 July 1987 attack by Iranian gunboats on the French container ship Ville d'Anvers, France broke diplomatic relations with Iran and announced on 29 July 1987 that the aircraft carrier Clemenceau and three support ships were being dispatched to the Gulf area[1]. After the 3 September 1987 attack on the Italian cargo ship Jolly Rubino, Italy announced that it would send ships to the Gulf to protect Italian merchantmen[2]. On 3 October 1987, Iran launched about 60 armed speedboats, apparently at the Saudi Arabian offshore oilfield at Khafji. Saudi Arabia sent jets and warships to intercept these gunboats and turn them back. No gunfire was exchanged[3].

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[1] "Iranian Speedboats Attack 2 Tankers", N.Y. Times, 7 Dec. 1987, p. A-3; "Iraq reports making hits in Iran and in the Gulf", Christian Science Monitor, 11 Dec. 1987, p. 2; Exhibit 32, S/16877/Add.5, p. 16.

[2] "Iranian Boats Attack Norwegian, Saudi Tankers", FBIS, 18 Dec. 1987, p. 22; Exhibit 32, S/16877/Add.5, p. 17-18

[3] "Iranian Gunboats Attack Norwegian Supertanker", FBIS, 24 Dec. 1987, p. 15.

Section II. Iranian Naval Mines Damaged Numerous Vessels and Prompted the Deployment of Minesweepers and Sealane Surveillance Forces to the Gulf.

Iran also without notice seeded mines on the high seas and in international shipping channels to threaten and damage shipping. On 17 May 1987, a Soviet-registered tanker leased to Kuwait, the Marshal Chuykov, suffered mine damage as it approached Kuwait[4]. By 16 June 1987, Iran was reportedly mining approaches to Kuwait's Al-Ahmadi oil terminal[1]. On 24 July 1987, the *Bridgeton*, a Kuwait-owned U.S.-flagged tanker under U.S. military escort into the Gulf, hit a mine about 18 miles west of the Iranian island of Farsi[2]. Consequently, the United States ordered U.S. Navy minesweeping helicopters to the Gulf[3]. Other nations followed suit. On 11 August 1987, the United Kingdom and France announced that they would send minesweepers to the Gulf[4]. In September, Belgium, the Netherlands, and Italy announced that they also would dispatch minesweepers to the Gulf[5].

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[1] "French Ship is Attacked in Gulf, Raising Paris-Teheran Tensions", N.Y. Times, 14 Jul. 1987, p. A-6; "Mine-Hunter Helicopters Sent to Gulf", Wash. Post, 30 Jul. 1987, p. A-1.

[2] "Iran Fires Missile at Kuwait", Wash. Post, 5 Sep. 1987, p. A-1 (Exhibit 35).

[3] "Saudis Turn Back Iranian Flotilla Near Oil Terminal", Wash. Post, 4 Oct. 1987, p. A-1 (Exhibit 35).

[4] "Iraqi Missile Hits U.S. Navy Frigate in Persian Gulf", N.Y. Times, 18 May 1987, p. A-1 (Exhibit 35); Exhibit 32, S/16877/Add.5, p. 7.

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[1] "What's News", *Wall Street Journal*, 17 June 1987, p.1.

[2] "After the Blast, Journey Continues", *N.Y. Times*, 25 July 1987, p.5 (Exhibit 35).

[3] "U.S. Acts to Bolster Gulf Mine Defenses on Several Fronts", *Wall Street Journal*, 4 Aug. 1987, p.1; "8 U.S. Helicopters Arrive for Mission to Sweep the Gulf," *N.Y. Times*, 17 Aug. 1987, p. A-1 (Exhibit 35); "U.S. Orders 8 Old Minesweepers to the Gulf", N.Y. Times, 20 Aug. 1987, p. A-1 (Exhibit 35).

[4] "Europeans Send Mine Sweepers", *Wash. Post*, 12 Aug. 1987, p. A-1 (Exhibit 35).

[5] "Dutch Sending 2 Ships to Hunt Mines in Gulf", *N.Y. Times*, 8 Sep. 1987, p. A-3; "Perez de Cuellar's Gulf Trip Ends in Apparent Failure", *Wash. Post*, 16 Sep. 1987, p. A-1 (Exhibit 35).

Unfortunately, the mines continued to inflict damage indiscriminately to vessels. On 10 August 1987, the U.S.-owned, Panama-registered tanker *Texaco Caribbean* struck a mine off Fujaira, south of the Hormuz Peninsula[1]. On 22 September 1987, the Panamanian-registered *Marissa I* survey ship sank after hitting a mine north of Bahrain; four of its seven crewmen were believed dead[2].

Although at times Iran denied that it was the source of these mines, in a Tehran radio dispatch on 20 August 1987, Iran admitted that it had mined the Gulf, purportedly to "protect" its coastline[3]. Any doubts as to the origin of these mines were put to rest when, on 21 September 1987, U.S. helicopters identified an Iranian ship, the *Iran Ajr*, planting mines in international waters of the Gulf. The ship was incapacitated by the helicopters and then boarded by the U.S. Navy. Ten mines being readied for deployment in shipping channels were found on board the Iran Ajr[1]. Within days, Iranian President Seyed Ali Khamenei declared to the United Nations General Assembly that "the United States will receive a proper response to this abominable act[2]."

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[1] "Iran Says it Mines the Gulf", *Wash. Post*, 21 Aug. 1987, p. A-1 (Exhibit 35); Exhibit 32, S/16877/Add.5, p. 9.

[2] "U.S. Arranges Return of 26 Iranian Sailors", *Wash. Post*, 25 Sep. 1987, p. A-1.

[3] "Iran Says it Mines the Gulf", *Wash. Post*, 21 Aug. 1987, p. A-1 (Exhibit 35).

Section III. In Addition to Gunboat Attacks and the Laying of Naval Mines, Iran Launched Silkworm Missiles Against Kuwait Shipping and Shore Facilities.

Along with its use of gunboats and mines, Iran constructed missile sites and launched Silkworm missiles to disrupt shipping of oil. On 4 September 1987, Iran fired a Silkworm missile from the Faw Peninsula toward Kuwait; the missile hit an uninhabited beach area two miles south of an oil loading terminal[1]. On 15 October 1987, however, an Iranian Silkworm missile fired from the Faw peninsula hit the U.S.-owned, Liberian-flagged oil tanker *Sungari* anchored off Kuwait's Mina al-Ahmadi port in Kuwaiti territorial waters. There were no casualties[2]. The next day another Iranian Silkworm missile hit the *Sea Isle City*, a Kuwait-owned, U.S.-registered tanker also anchored off Mina al-Ahmadi. Eighteen seamen, including the U.S. captain, were injured[3]. On 22 October 1987, an Iranian

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[1] "U.S. Helicopters Hit Iranian Navy Ship in Persian Gulf", Wash. Post, 22 Sep. 1987, p. A-1; "U.S. Reports Firing on Iranian Vessel Seen Laying Mines", N.Y. Times, 22 Sep. 1987, p. A-1 & "26 Iranians Seized with Mine Vessel; More U.S. Shooting", N.Y. Times, 23 Sep. 1987, p. A-1.

[2] Address by the President of the Islamic Republic of Iran, Seyed Ali Khamenei, to the United Nations General Assembly, 22 Sep. 1987, A/42/PV.6.

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[1] "Iran Fires Missile at Kuwait", *Wash. Post*, 5 Sep. 1987, p. A-1 (Exhibit 35).

[2] "Iran Hits U.S.-Owned Tanker", *Wash. Post*, 16 Oct. 1987, p. A-1 (Exhibit 35); Exhibit 32, S/16877/Add.5, p. 14.

[3] "UN Head Told of Attack", *FBIS*, Middle East & South Asia Review, 19 Oct. 1987, p. 17. In response to Iraq's unlawful use of force against shipping -- especially its October 16 Silkworm attack -- four U.S. destroyers on October 19, 1987, destroyed an inactive Iranian oil platform used as a base for Iranian speedboat attacks against Gulf ships. The U.S. Navy gave the Iranian occupants of the oil platform 20 minutes to evacuate before shelling the platform, which was some 100 miles south of Lavan Island. "U.S. Destroyers Shell Iranian Military Platform in Gulf", *Wash. Post*, 20 Oct. 1987, p. A-1.

Silkworm missile hit Kuwait's Sea Island terminal[1].

Section IV. The Most Damaging of Iran's Attacks Against Shipping Were Attacks by Iranian Fighter Aircraft, Which Resulted in Notices by the United States That All Aircraft for Their Own Safety Should Avoid Approaching Military Vessels.

Although most of Iran's attacks against merchant shipping were through use of small boats, there had been very damaging attacks as well by Iranian military aircraft, particularly during 1984-1986. Iranian fighter aircraft conducted a majority of these attacks using Maverick missiles and iron bombs[2]. Maverick missiles can be launched from ranges of 0.5 to 13 nautical miles and are television guided. The launching aircraft must be able to keep visual track of the target, but does not have to scan its target with radar[3]. For example, on 2 February 1988, two Iranian F-4s launched two Maverick missiles at the Liberian tanker Petrobulk Pilot about 30 nautical miles south-southwest of the area where the incident of 3 July 1988 took place[1]. In addition to Maverick missiles, military forces in the Gulf knew that aircraft, including Iranian F-14s, could be configured to drop iron bombs on naval vessels if they could approach within two nautical miles of the target[2].

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[1] "Silkworm Hits Kuwaiti Oil Terminal", Wash. Post, 23 Oct. 1987, p. A-1.

[2] Exhibit 9, Appendix E, p. E-12.

[3] *Ibid*.

Section V. Iranian Attacks on Innocent Shipping Continued into 1988.

Iranian gunboats attacked the Norwegian tanker Igloo Espoo on 15 January 1988, near the Strait of Hormuz[3]. Agence France-Presse reported a 15 January 1988, Iranian attack on a Norwegian tanker, and 16 January attacks on the Liberian-registered Atlantic Charisma and Liberian-registered Rainbow[4]. On 21 January, Iran attacked the Norwegian-owned Hafpel in the Strait of Hormuz and set ablaze the Panamanian Topaz. Iran asserted that its attack on the Hafpel was a mistake[1]. Iranian gunboats on 23 January 1988, attacked the empty Danish-flagged Torm Rotna[2]. On 3 February 1988, Iranian gunboats hit and set ablaze a Norwegian freighter approximately ten nautical miles from the United Arab Emirates port of Al-Sharigah[3]. On 5 February 1988, Iranian gunboats attacked the Panamanian-registered Tavistock near Dubai[4]. On 7 February 1988, the U.S.-owned, Liberian-registered Diane was set ablaze in an attack by gunboats off the coast of the United Arab Emirates[5]. On 10 February 1988, an Iranian speedboat attacked a Liberian tanker[1].

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[1] "Iran Tries Aerial Attack on Cargo Ship in Gulf", Christian Science Monitor, 3 Feb. 1988, p. 2 (Exhibit 35); Exhibit 9, Appendix E, p. E-10.

[2] Exhibit 9, Appendix E, p. E-12.

[3] "Iranian Gunboats Attack Norwegian Tanker", FBIS, Near East & South Asia, 15 Jan. 1988, p. 20.

[4] "Iran-Iraq War", FBIS, Near East & South Asia, 19 Jan. 1988, p. 2.

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[1] "Panamanian Tanker Attacked" & "Reportage on Iranian Attacks on Oil Tankers", FBIS, Near East & South Asia, 22 Jan. 1988, p. 19.

[2] "Two Ships Attacked in Gulf; Iraqi General Dies in Crash", Wash. Post, 24 Jan. 1988, p. A-24.

[3] "Iranian Speedboats Attack Noregian Ship", FBIS, Near East & South Asia, 3 Feb. 1988, p. 18.

[4] "Iranian Boats Attack Tanker Off Dubayy", FBIS, Near East & South Asia, 5 Feb. 1988, p. 27.

[5] "Iranian Gunboats Attack U.S.-Owned Tanker", FBIS, Near East & South Asia, 8 Feb. 1988, p. 20.

On 12 February, Iranian military units fired on U.S. helicopters on reconnaisance over a Kuwaiti convoy[2]. On 7 March 1988, U.S. helicopters on reconaissance flights came under machine-gun fire from an oil platform and several boats in the central Gulf[3].

In March 1988, Iranian gunboats attacked Norway's tanker *Berge Lord*, Liberia's *Fumi*, Spain's *Iberian Reefer*, and Cyprus' tanker *Odysseus AG* in the Strait of Hormuz, as well as Norway's

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[1] "Iran-Iraq War", *FBIS*, Middle East & South Asia Review, 11 Feb. 1988, p. 1.

[2] "U.S. Helicopters Fired on From Oil Platforms", *FBIS*, Near East & South Asia, 16 Feb. 1988, p. 60.

[3] "What's News" (U.S. Helicopters Drew Machine-gun Fire in the Central Persian Gulf), *Wall Street Journal*, 7 Mar. 1988, p. 1; "U.S. Helicopters Come Under Fire in the Gulf", *N.Y. Times*, 7 Mar. 1988, p. A-5.

Hukumit 12 miles off the Dubai coast (killing two crewmen), Liberia's *Atlantic Peace* near Sharja, and the Singapore-registered *Neptune Subaru*[1].

In May and June of 1988, Iranian gunboats in the Strait of Hormuz attacked the Japanese *Ace Chemi*; the Norwegian-owned *Berge Strand*; the Liberian *Mundo Gas Rio*; the West German *Dhaulagiri*; and a U.S.-owned, British-registered supertanker[2].

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[1] "3 Tankers Hit by Gunboats". *FBIS*, Near East & South Asia, 18 Mar. 1988, p. 56; "Norwegian Tanker Attached", *FBIS*, Near East & South Asia, 23 Mar. 1988, p. 17; "54 Feared Dead on 2 Oil Tankers in Iraqi Attack on Iran Terminal", *N.Y. Times*, 22 Mar. 1988, p. A-1; "Liberian Oil Tanker Attacked", *FBIS*, Near East & South Asia, 22 Mar. 1988, p. 1 & 67; "Iranians Hit Cypriot Ship", *FBIS*, Near East & South Asia, 24 Mar. 1988, p. 33; "Iranian Gunboats Hit Liberian Tanker in Gulf", *FBIS*, Near East & South Asia, 28 Mar. 1988, p. 17.

[2] "Speedboats Attack Japanese Chemical Tanker," *FBIS*, Near East & South Asia, 19 May 1988, p. 11; "Teheran Claims Gains in Northeastern Iraq", *N.Y. Times*, 19 May 1988, p. A-11; "Iranian Boats Attack Tanker", *N.Y. Times*, 20 May 1988, p. A-3; "Iranian Speedboats", *Christian Science Monitor*, 27 May 1988, p. 2; "Reportage on Iranian Gunboat Attacks on Tanker", *FBIS*, Near East & South Asia, 27 May 1988, p. 14; "UK Supertanker Attacked Near Saudi Port 11 Jun", *FBIS*, Near East & South Asia, 13 Jun. 1988, p. 69; "Iranian Gunboats Launch Attacks on Freighters", *FBIS*, Near East & South Asia, 14 Jun. 1988, p. 16.

Section VI. Efforts by the United Nations to End the Gulf War Were Unsuccessful.

Efforts in the United Nations to end the attacks on merchant shipping were unsuccessful. On 20 July 1987, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, passed unanimously Resolution 598 calling for a cease-fire in the Iran-Iraq War and calling for further meetings if the two States did not comply with the resolution[1]. On 12 November 1987, resolutions at the Arab League summit meeting in Amman, Jordan, stated that the Arab countries condemned Iran for attacking Kuwait and condemned Iran's interference in the internal affairs of the Arab gulf states[2].

As a result of the United States' efforts to protect its vessels in the Gulf, Iran repeatedly charged (as it does in its Memorial) that the United States was not a neutral in the Iran-Iraq war[3]. The United States certainly worked to bring the war to a negotiated end, leaving neither victor nor vanquished, but any concerted U.S. pressure on Iran reflected Iran's intransigence to negotiate with Iraq despite Security Council Resolution 598, and not an attempt by the United States to intervene in the war on behalf of Iraq[1].

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[1] U.N. Security Council Resolution 598 of July 20, 1987 (S/RES/598); "U.S. Warships Set to Begin Escorts of Gulf Tankers", N.Y. Times, 22 Jul. 1987, p. A-2. Iraq responded to the Resolution as "positive" while Iran called it "null and void". "Iraq is Warm to Truce Call; Iran is Harsh", N.Y. Times, 22 Jul. 1987, p. A-20.

[2] "Gulf Conflict", FBIS, Near East & South Asia, 12 Nov. 1987, p. 2; "Arab Summit Conference", FBIS, Near East & South Asia, 13 Nov. 1987, p. 1.

[3] Iranian Memorial, paras. 1.36-1.45.

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[1] The United States position was that the Security Council should impose an arms embargo on either Iran or Iraq, whichever failed to comply with Resolution 598. See "U.S. Policy in the Persian Gulf", op. cit., Exhibit 36, pp. 3-4. Even Members of the Arab Gulf Cooperation Council urged the imposition of sanctions against Iran for its aggressive tactics in the Gulf. "Arab Nations on Gulf Urge Sanctions Against Iran", N.Y. Times, 30 Dec. 1987, p. A-3.

ANNEX 2

U.S. ISSUANCE OF NOTAMS REGARDING AIRCRAFT IN THE GULF AREA

Out of concern for the safety of its vessels, and the need for those vessels to respond to perceived threats, the United States in early 1984 wished to inform civil aircraft in the Gulf about U.S. defensive precautions with respect to air attacks. Annex 15 of the Chicago Convention provides that origination of civil Notices to Airmen (NOTAM) is the responsibility of the State which exercises air traffic service authority over the affected area[1]. Consequently, in January 1984, the U.S. Federal Aviation Administration, in compliance with Annex 15, provided the proposed a Special Notice to States controlling Flight Information Regions in the affected areas, so that they they could issue an appropriate NOTAM[2]. The

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[1] Chicago Convention, Annex 15, paras. 3.1.1.1, 3.1.2, 3.1.4, and 5.1.1.1 (Exhibit 5).

[2] U.S. Special Notice of Information, Jan. 1984 (Exhibit 85). The designation "KDCAYN" in this notice represents the U.S. Federal Aviation Administration International Notice to Airman office in Washington, D.C. The designation "KCNFYN" represents the Central Notice to Airmen Facility, Carswell Air Force Base, Ft. Worth Texas. The designation "SVC" represents the term "service message" which distinguishes the notice from a notice to airmen.

Special Notice stated that U.S. naval vessels in the Persian Gulf, Strait of Hormuz, Gulf of Oman, and Arabian Sea (north of 20 degrees north) were taking defensive precautions. The Special Notice stated that aircraft approaching within five nautical miles of U.S. vessels should establish and maintain contact with the U.S. vessels on either the international civil air distress frequency (121.5 MHz VHF) or the international military air distress frequency (243.0 MHz UHF)[1].

Under Annexes 11 and 15 of the Chicago Convention, the aeronautical information service of each State should obtain and publish (in the form of NOTAMS and other publications) critical information that they receive concerning the safety of civil aviation in their territories, as well as areas over which they have responsibility[2]. The Government of Iran, however, objected to this Special Notice and in February 1984 sent messages to all States in the region denouncing the

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[1] U.S. Special Notice, Jan. 1984, *op. cit.*, Exhibit 85.

[2] *See* Chicago Convention, Annex 11, para. 2.15.3 (Exhibit 4); Chicago Convention, Annex 15, paras. 3.1.4 and 5.1.1.1 (Exhibit 5).

Special Notice as illegal[1]. Further, Iran lodged a complaint at the ICAO Middle East Regional Air Navigation meeting in March 1984 urging that steps be taken in response to the Special Notice[2]. The Gulf States did not publish the special notice provided by the United States.

Faced with the fact that Iran did not intend to comply with its obligation under the Chicago Convention annexes to promulgate this safety information, and that Iran was actively denouncing it as illegal to other States in the region, the United States felt compelled to publish the Special Notice as a U.S. international civil NOTAM[3]. Following the USS Stark incident, in which an Iraqi military aircraft attacked a U.S. naval vessel and killed 37 crewmen, the United States updated its NOTAM[1]. The NOTAM was further updated in September 1987[2]. The NOTAM was current on 3 July 1988[3]. The NOTAM and its updates were distributed to States on the distribution list for NOTAMs issued by the United States and through official civil and military channels, as well as through the U.S. Embassies in the area[4].

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[1] Notice from the Civil Aviation Organization of Iran, 27 Feb. 1984 (Exhibit 86).

[2] "Restrictions Imposed in the Airspace over the High Seas and over Territorial Waters of other States in the Mid Region," presented by Iran to the Third Middle East Regional Air Navigation Meeting and U.S. Amendment. Working Papers, Third Middle East Regional Air Navigation Meeting (Mar. - Apr. 1984), ICAO Docs. MID/3-WP/108, MID/3-WP/77 (Exhibit 87).

[3] ICAO Report, para. 2.2.2. International Civil Notice to Airmen, 11 Jan. 1985 (Exhibit 88). The designation "KFDC" in this notice shows that the originating agency of the NOTAM is Washington, D.C. The designation "A0002/85" is the international NOTAM identifier number.

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[1] Updated International Civil Notice to Airmen, 19 Aug. 1987 (Exhibit 88).

[2] Updated Notices to Airmen, 8 and 9 Sep. 1987 (Exhibit 88).

[3] ICAO Report, para. 2.2.2; ICAO Report, Appendix F, p. F-4.

[4] ICAO Report, para. 2.2.3. The United States transmitted the updates to U.S. Embassies in the Gulf for hand delivery to the civil aviation authorities of the host countries with responsibility for the affected areas, with a request that they publish it. By using U.S. Embassy channels the United States could verify receipt of the notice and lend emphasis and urgency to the need for the appropriate States to publish the notice. As a result of these efforts, Iran again complained to ICAO about the matter in September 1987. Telex dated 14 Sep. 1987 from Iranian Civil Aviation Organization to ICAO Council President (Exhibit 89).

Iran argues that the promulgation of these NOTAMs was not in conformity with the provisions of Annex 15, but neglects to note that Iran's refusal to publish such critical information is inconsistent with Annexes 11 and 15[1], and that Iran's objection to the Special Notice discouraged other States from publishing it. Although it would have been more appropriate for Iran to disseminate such information, under the circumstances it was a reasonable, appropriate, and necessary step taken by the United States since Iran refused to comply with its responsibility to warn the civil aviation public of the potential danger in overflying U.S. naval vessels in the Gulf. Further, Annex 15 does not state that other countries are prohibited from issuing on their own such information by NOTAM or otherwise.

Iran's suggestion that increased dangers to civil air traffic in the Gulf was attributable to U.S. naval activities is incorrect[2]. Attacks by both Iran and Iraq in the Gulf created the climate of danger, in part due to the establishment and realignment of some Air Traffic Service (ATS) routes at variance with the ICAO regional air navigation plan[1]. Yet most important, countries such as Iran failed to establish and maintain close cooperation with foreign military authorities in the Gulf responsible for activities that could affect civil aircraft[2].

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[1] See Footnote 4 of this Annex, supra.

[2] Iran complained to ICAO about an incident that allegedly occurred on 26 May 1987 involving U.S. naval aircraft. The U.S. Navy, however, did not have any fighter aircraft in the Gulf on that day, nor any record of a radio transmission telling an aircraft not to proceed on course. ICAO took no action in this matter.

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[1] Letter of ICAO President Kotaite, Working Paper, ICAO Council (extra. sess., July 1988), ICAO Doc. C-WP/8642, Appendix B (Exhibit 12).

[2] Under Chicago Convention, Annex 11, para. 2.14.1, ATS authorities are supposed to establish and maintain close cooperation with military authorities responsible for activities that may affect flights of civil aircraft. Indeed, arrangements are to be made to permit information relevant to the safe and expeditious conduct of flights of civil aircraft to be promptly exchanged between ATS units and appropriate military units. Chicago Convention, Annex 11, para. 2.14.3 (Exhibit 4). Similarly, the appropriate ATS authorities are obliged to initiate the promulgation of information regarding military activities that that are potentially hazardous to civil aircraft. Ibid., para. 2.15.3. The objective of such co-ordination is to achieve the best arrangements which will avoid hazards to civil aircraft and minimize interference with the normal operations of such aircraft. Although the United States had sought to establish guidelines for the safe interaction of civil aircraft with U.S. military forces, Iran's only efforts in this area consisted of denouncing the United States' efforts.

After extensive consultations with the affected states, on 1 March 1989, the United States withdrew the NOTAM it had issued for the Gulf and again asked regional States to issue the NOTAM themselves. This time virtually all the Gulf States (including Iran) issued NOTAMs pursuant to the U.S. request.

TABLE OF EXHIBITS[1]

Pursuant to Article 50 of the Rules of Court, the United States has also deposited several documents in the Registry in connection with these Preliminary Objections. The documents so deposited are noted below.

1. Convention on International Civil Aviation of 1944 (the "Chicago Convention").
2. Annex 6 to the Chicago Convention (excerpts).
3. Annex 10 to the Chicago Convention (excerpts).
4. Annex 11 to the Chicago Convention (excerpts).
5. Annex 15 to the Chicago Convention (excerpts).
6. Rules for the Settlement of Differences, ICAO Document 7782/2 (1975) (the "Rules").
7. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 (the "Montreal Convention").
8. Treaty of Amity, Economic Relations and Consular Rights of 1955 between the United States and Iran.
9. Working Paper (11 November 1988), ICAO Document C-WP/8708, restricted.

   Report of ICAO Fact-Finding Investigation (November 1988), ICAO Document C-WP/8708, restricted, Appendix (the "ICAO Report").
10. Letter dated 4 July 1988 from ICAO Council President to ICAO Council Representatives, ICAO Document PRES AK/165 (with attachments).
11. Letter dated 5 July 1988 from ICAO Council President to ICAO Council Representatives, ICAO Document PRES AK/166.
12. Working Papers, ICAO Council (extraordinary session, July 1988), ICAO Documents C-WP/8643, Appendix B, C-WP/8644 (with attachments).
13. Minutes, ICAO Council (extraordinary session, 13 July 1988), ICAO Document DRAFT C-Min. EXTRAORDINARY (1988)/1.
14. Minutes, ICAO Council (extraordinary session, 14 July 1988), ICAO Document DRAFT C-Min. EXTRAORDINARY (1988)/2.

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[1] Not reproduced. *[Note by the Registry.]*

15. Minutes, ICAO Council (125th session, 5 December 1988, closed), ICAO Document DRAFT C-Min. 125/12.

16. Minutes, ICAO Council (125th session, 7 December 1988, closed), ICAO Document DRAFT C-Min. 125/13.

17. Minutes, ICAO Council (125th session, 7 December 1988, closed), ICAO Document DRAFT C-Min. 125/14.

18. Minutes, ICAO Council (125th session, 14 December 1988), ICAO Document DRAFT C-Min. 125/18.

19. Minutes, ICAO Council (126th session, 13 March 1989), ICAO Document DRAFT C-Min. 126/18.

20. Minutes, ICAO Council (126th session, 15 March 1989), ICAO Document DRAFT C-Min. 126/19.

21. Minutes, ICAO Council (126th session, 17 March 1989), ICAO Document DRAFT C-Min. 126/20.

22. Summary, ICAO Council (126th session, 17 March 1989), ICAO Document C-DEC 126/20.

23. Minutes, ICAO Air Navigation Commission (2 February 1989), ICAO Document AN. Min. 120-6.

    Minutes, ICAO Air Navigation Commission (7 February 1989), ICAO Document AN. Min. 120-7.

    Minutes, ICAO Air Navigation Commission (9 February 1989), ICAO Document AN. Min. 120-8.

24. Letter dated 26 May 1989 from Dr. Michael Milde, ICAO Legal Bureau Director, to the Court.

25. "Iranian Airbus Tragedy", Department of State Bulletin, pp. 38-43 (September 1988).

26. Letter dated 3 July 1988 from the Acting Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General, United Nations Document S/19979.

27. Letter dated 6 July 1988 from the Acting Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, United Nations Document S/19989.

28. Resolution 616, United Nations Security Council (2821st meeting, 20 July 1988), United Nations Document S/RES/616.

29. United States Cable dated 31 August 1988 from Washington, D.C. to United States Embassy, Berne, Switzerland.

United States Cable dated 2 September 1988 from United States Embassy, Berne, Switzerland to Washington, D.C.

United States Cable dated 6 September 1988 from United States Embassy, Berne, Switzerland to Washington, D.C.

United States Cable dated 23 September 1988 from Washington, D.C. to United States Embassy, Berne, Switzerland.

United States Cable dated 26 September 1988 from United States Embassy, Berne, Switzerland to Washington, D.C.

United States Cable dated 8 February 1989 from United States Embassy, Berne, Switzerland to Washington, D.C. (with attachments).

United States Cable dated 30 March 1988 from Washington, D.C. to United States Embassy, Berne, Switzerland.

United States Cable dated 31 March 1988 from Washington, D.C. to United States Embassy, Berne, Switzerland.

Diplomatic Note 43 dated 16 April 1989 from Embassy of Switzerland in Iran to the Iranian Ministry of Foreign Affairs.

United States Diplomatic Note dated 13 June 1989 to Government of Switzerland (with attachments).

Diplomatic Note dated 26 June 1989 from Switzerland to the United States.

United States Diplomatic Note dated 11 July 1989 to Government of Switzerland (with attachments).

Diplomatic Note dated 12 July 1989 from Embassy of Switzerland in Iran to the Government of Iran.

30. Department of State Daily Press Briefing, pp. 1-4 (17 July 1989).

31. Resolution 479, United Nations Security Council (2248th meeting, 28 September 1980), reprinted in United Nations Document S/INF/36, p. 23.

Resolution 514, United Nations Security Council (2383rd meeting, 12 July 1982), United Nations Document S/RES/514.

Resolution 522, United Nations Security Council (2399th meeting, 4 October 1982), United Nations Document S/RES/522.

Resolution 540, United Nations Security Council (2493rd meeting, 31 October 1983), United Nations Document S/RES/540.

Resolution 552, United Nations Security Council (2546th meeting, 1 June 1984), United Nations Document S/RES/552.

Resolution 582, United Nations Security Council (2666th meeting, 24 February 1986), United Nations Document S/RES/582.

Resolution 588, United Nations Security Council (2713th meeting, 8 October 1986), reprinted in United Nations Document S/INF/42, p. 13.

Resolution 598, United Nations Security Council (2750th meeting, 20 July 1987), United Nations Document S/RES/598.

32. Report of the Secretary-General in Pursuance of Security Council Resolution 552 (1984), United Nations Document S/16877 (with addenda).

33. Letter dated 9 October 1987 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, United Nations Document S/19194.

Letter dated 10 October 1987 from President Reagan to the President Pro Tempore of the Senate and the Speaker of the House, Weekly Compilation of Presidential Documents (1987)

34. Letter dated 18 April 1988 from the Acting Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, United Nations Document S/19791.

35. Newspaper articles, 1981-1989 (in chronological order).

36. "U.S. Policy in the Persian Gulf", Special Report No. 166, United States Department of State (July 1987).

37. P. DeForth, "U.S. Naval Presence in the Gulf: The Mideast Force Since World War II", Naval War College Review, pp. 28-38 (Summer 1975).

38. R. O'Rourke, "Gulf Ops", Naval Review Proceedings, pp. 42-50 (1989).

39. N. Friedman, "The Vincennes Incident", Naval Review Proceedings, pp. 71-79 (1989).

40. D. Carlson, "Comment and Discussion", Proceedings, pp. 87-92 (September 1989).

41. Rule 15 of the Standing Rules of Procedure of the ICAO Assembly, ICAO Document 7600/5.

42. Documents, ICAO Legal Committee (18th session, September - October 1970), ICAO Document 8910, reprinted in ICAO Document 8936, Volume 2, p. 16.

43. Minutes and Documents, International Conference on Air Law (September 1971), ICAO Document 9081, pp. 1-2, 134.

44. Action of the ICAO Council (78th session, January - March 1973), ICAO Document 9079, pp. 11-13.

45. Minutes, ICAO Assembly (19th session - extraordinary, February - March 1973), ICAO Document 9061, pp. 11, 35, 40-44.
[A complete copy of this document has been deposited in the Registry.]

46. Action of the ICAO Council (79th session, May - June 1973), ICAO Document 9097, pp. 30-34.

47. Minutes, ICAO Council (79th session, June 1973, closed), ICAO Document 9073, pp. 27-28, 56.
[A complete copy of this document has been deposited in the Registry.]

48. Resolutions and Plenary Minutes, ICAO Assembly (20th session - extraordinary, August - September 1973), ICAO Document 9087, pp. 14, 122-143.

49. Working Papers, ICAO Assembly (20th session - extraordinary, August - September 1973), ICAO Documents A20-WP/2, pp. 1, 9-15; A20-WP/3; A20-WP/4; A20-WP/14; A20-WP/15; A20-WP/30.

50. Reports and Minutes of the Executive Committee, ICAO Assembly (20th session - extraordinary, August - September 1973), ICAO Document 9088, pp. 7-9, 34, 41, 59-64, 110, 117-119, 131-133, 141, 143-146.
[A complete copy of this document has been deposited in the Registry.]

51. Minutes and Documents, ICAO International Conference on Air Law (August - September 1973), ICAO Document 9225, pp. 98, 100-101, 143, 147, 156, 341-343, 367-380.
[A complete copy of this document has been deposited in the Registry.]

52. Action of the ICAO Council (extraordinary and 80th sessions, August, October - December 1973), ICAO Document 9098, pp. 56-58.

53. Reports and Minutes, Executive Committee, ICAO Assembly (24th session, September - October 1983), ICAO Document 9409, pp. 10-15.

54. Minutes, ICAO Assembly (24th session, September - October 1983), ICAO Document 9415, pp. 160-167.

55. Minutes, ICAO Council (extraordinary session, September 1983), ICAO Document 9416, pp. 10, 14-15, 17, 21, 23, 29, 31, 36, 38, 53-56, 59-60.
[A complete copy of this document has been deposited in the Registry.]

56. Working Paper, ICAO Council (extraordinary session, September 1983), ICAO Document C-WP/7694.

57. Action of the ICAO Council (110th and extraordinary sessions, September, October - December 1983), ICAO Document 9428, pp. 20-28.

58. Minutes, ICAO Council (111th session, February - March 1984), ICAO Document 9441, pp. 85, 90, 102, 106.
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59. Action of the ICAO Council (111th session, February - March 1984), ICAO Document 9442, pp. 9-11.

60. Reports and Minutes, Executive Committee, ICAO Assembly (25th session - extraordinary, April - May 1984), ICAO Document 9438, pp. 3, 19, 22, 30, 36, 44-45, 47, 61, 75.
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61. Protocol Relating to an Amendment to the Convention on International Civil Aviation, signed at Montreal on 10 May 1984, ICAO Document 9436.

62. S. Rosenne, *The Law and Practice of the International Court*, p. 580 (1985).

63. Report of the Sixth Committee, UNGA (25th sess., Dec. 1970), U.N. Doc. A/8238, p. 19.

Report of the Sixth Committee, UNGA (26th sess., Dec. 1971), U.N. Doc. A/8568, p. 21.

64. E. Jimenez de Arechaga, "The Amendments to the Rules of Procedure of the International Court of Justice", 67 *American Journal of International Law*, pp. 1, 11-13 (1973)

65. G. Guyomar, *Commentaire du Reglement de la Cour Internationale de Justice - Interpretation et Pratique*, p. 371 (1972) (with English translation).

66. M. Milde, "Dispute Settlement in the Framework of the International Civil Aviation Organization", Settlement of Space Law Disputes, pp. 87, 90 (1980).

67. N.M. Matte, Treatise on Air-Aeronautical Law, pp. 205-208 (1981).

68. R. Gariepy and D. Botsford, "The Effectiveness of the International Civil Aviation Organization's Adjudicatory Machinery", 42 Journal of Air Law and Commerce, pp. 351, 356-359 (1976).

69. ICAO, Repertory - Guide to the Convention on International Civil Aviation, ICAO Document 8900/2 (second edition), Article 84, pp. 1-4 (1977).

70. T. Buergenthal, Law-Making in the International Civil Aviation Organization, pp. 123-197 (1969).

71. Bin Cheng, The Law of International Air Transport, pp. 100-101 (1962).

72. R.H. Mankiewicz, "Pouvoir Judiciaire du Conseil et Reglement pour la Solution des Differends", 3 Annuaire Francais de Droit International, pp. 383-404 (1957) (with English translation).

73. G. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council", 12 Canadian Yearbook of International Law, pp. 153-185 (1974).

74. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation of 1988.

75. Convention on Offences and Certain Other Acts Committed On Board Aircraft of 1963 (the "Tokyo Convention").

76. Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 (the "Hague Convention").

77. F. Kalshoven, Constraints on the Waging of War (1987), pp. 7-8, 26-27.

78. International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Y. Sandoz, C. Swinarski, B. Zimmerman, editors), pp. 39-40 (1987) (the "ICRC Commentaries").

79. "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)", reprinted in 72 American Journal of International Law, pp. 457, 467-470 (1978).

80. *Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare*, pp. 255-256 (1923).

81. Letter dated 10 March 1986 from the Representative of the Islamic Republic of Iran to the ICAO Council President, ICAO Document PRES AK/106 (with Attachment 11).

Letter dated 20 February 1986 from the Representative of the Islamic Republic of Iran to the Secretary-General, United Nations Document S/17850.

Letter dated 25 February 1986 from the Representative of the Islamic Republic of Iran to the Secretary-General, United Nations Document S/17863.

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87. Working Papers, Third Middle East Regional Air Navigation Meeting (March - April 1984), ICAO Documents MID/3-WP/108 MID/3-WP/77.

88. International Civil Notice to Airmen, 11 January 1985.

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OBSERVATIONS AND SUBMISSIONS OF THE ISLAMIC REPUBLIC OF IRAN ON THE PRELIMINARY OBJECTIONS

OBSERVATIONS ET CONCLUSIONS DE LA RÉPUBLIQUE ISLAMIQUE D'IRAN SUR LES EXCEPTIONS PRÉLIMINAIRES

IN THE NAME OF GOD

INTRODUCTION

1. These Observations and Submissions are submitted pursuant to the Court's Order of 9 April 1991, subsequently amended by its Orders of 18 December 1991 and 5 June 1992, fixing 9 September 1992 as the time-limit for the submission of the Islamic Republic of Iran's observations and submissions on the Preliminary Objections filed by the United States on 4 March 1991.

CHAPTER I GENERAL OBSERVATIONS ON THE PRELIMINARY OBJECTIONS

2. In its pleadings, the Islamic Republic has invoked three separate, yet complementary, titles of jurisdiction pursuant to which the Court, under Article 36(1) of its Statute, is empowered to decide the claims submitted by the Islamic Republic. They are Article 84 of the Chicago Convention, Article 14(1) of the Montreal Convention and Article XXI(2) of the Treaty of Amity between Iran and the United States. Each of these Articles contains a compromissory clause vesting jurisdiction in the Court to decide disputes between the Parties concerning the interpretation or application of the treaties or conventions in question.

3. The United States admits at page 2 of its Preliminary Objections that as a matter of principle each of the provisions invoked by the Islamic Republic confers jurisdiction on the Court to decide disputes relating to the interpretation or application of the relevant treaties. However, the United States goes on to argue that the invocation of these provisions is subject to certain preconditions which, according to the United States, have not been satisfied in this case. Accordingly, the United States requests the Court to address its Preliminary Objections under Article 79 of the Rules of Court, and to uphold

those objections. Significantly, the United States does not raise any objection as to the admissibility of the Islamic Republic's Application.

4. In these Observations, the Islamic Republic will show that disputes clearly exist between itself and the United States over the interpretation or application of each of the treaties invoked. This is evidenced not only by the positions that the Parties took before the institution of these proceedings as to the legal consequences of, and responsibility for, the shooting down of Flight IR 655, but also by their submissions in this case. In its Preliminary Objections the United States continues to argue that its actions were justified as self-defense or as measures designed to protect its essential security interests (both essentially defenses on the merits). The Islamic Republic, on the other hand, maintains that the United States breached substantive provisions of all three treaties by shooting down an unarmed, commercial aircraft flying within its own airspace, by otherwise interfering with the Islamic Republic's navigation and commerce in the Persian Gulf, and by failing to accept responsibility for the incident or compensate the victims for the damage provoked.

5. Although the Islamic Republic relied on the repeated U.S. declarations of neutrality during the Iran/Iraq war, and treated the United States as a neutral, the Islamic Republic was aware that the actions that the United States took against it leading up to and including the events of 3 July 1988 were part of a deliberate policy designed to assist Iraq in its war efforts and provoke the Islamic Republic. This view has been confirmed by recent disclosures by U.S. officials and others, which evidence the profoundly hostile attitude that the United States adopted towards the Islamic Republic at the time, in particular with respect to the activities of U.S. forces in the Persian Gulf. It was in part as a result of this policy that Flight IR 655 was shot down and 290 innocent lives were lost. This evidence will be discussed further on in this pleading (see, Part II), and

it will be seen that disputes exist over these facts and their relation to the treaties invoked by the Islamic Republic. Thus, by far the most important pre-requisite to the Court's jurisdiction - the existence of a dispute over the interpretation or application of each of the treaties - is clearly met in this case. In fact, even the United States does not dispute that the Parties take opposing views with respect to the treaties concerned.

6. Recognizing this difficulty, the United States relies instead on formalistic objections. These take the guise of arguing either that the Islamic Republic did not follow the proper procedural rules in raising its claim (in the case of the Islamic Republic's appeal under the Chicago Convention from the decision of the ICAO Council), or that the Islamic Republic did not exhaust prior remedies by seeking to negotiate or arbitrate the dispute before instituting these proceedings (in the case of its claims arising under the Montreal Convention and the Treaty of Amity). Moreover, in what is principally an argument on the merits, in that it concerns the interpretation or application of the treaties concerned, the United States also contends that neither the Montreal Convention nor the Treaty of Amity have any substantive connection to the shooting down of Flight IR 655, and thus cannot be relied on to provide a basis of jurisdiction. If nothing else, this argument demonstrates that the Preliminary Objections do not possess an exclusively preliminary character.

7. With respect to the Chicago Convention, the Islamic Republic will demonstrate that the United States' argument that the decision of the ICAO Council from which an appeal is being sought was not a "decision" within the meaning of Article 84 of the Convention, and that in considering the matter the Council was not acting under Article 84, is not correct. As will be seen, in submitting the dispute to ICAO, the Islamic Republic did not refer to any particular provision of the Chicago Convention. Its concern was to have the

matter considered and ruled on as rapidly as possible, given the gravity of the incident and the continued threat to air navigation in the Persian Gulf posed by the actions of the U.S. warships. There are no grounds, therefore, for the United States' assertion that the matter was dealt with under Article 54(n) of the Chicago Convention. In fact, that provision was never invoked by the Council at any time during its deliberations.

8. What is clear from the record of the proceedings before the ICAO Council is that the requirements of Article 84 of the Chicago Convention, which is the sole basis of the Court's jurisdiction, were met. In other words, a disagreement over the Convention's application or interpretation was submitted to and decided on by the Council. In itself, this is sufficient to establish the Court's jurisdiction.

9. The Islamic Republic pursued both legal claims (that the United States should be held responsible for breaches of the Chicago Convention) and practical concerns (to ensure the safety of air navigation) before the ICAO Council. Being a non-member of the Council, the Islamic Republic left it to the Council to determine the procedures it would follow for deciding the matter. This approach was fully consistent with the Convention which gives the Council full power to determine the appropriate procedures in any matter before it. In the light of the urgency of the matter, the application of ICAO's Rules for the Settlement of Differences ("the Rules") could be suspended or varied with the agreement of the Parties in order to lead to a more expeditious or effective disposition of the case as effectively happened in this instance. Regrettably, despite a full airing of both Parties' positions on the issues and the commissioning of a fact-finding investigation, the Council failed to respond adequately to the legal aspects of the Islamic Republic's claim. Instead, the Council limited itself mostly to discussing "technical" aspects of the matter. Nevertheless, there is no

doubt that the Council rendered a final decision on the dispute submitted by the Islamic Republic finding that the shoot-down was an accident, albeit due to errors in identification of the aircraft, and rejecting the Islamic Republic's requests for relief. It is this decision which the Islamic Republic is appealing pursuant to Article 84 of the Convention.

10. Whether the Council's failure to properly address the Islamic Republic's claims resulted from the fact that its membership is heavily weighted in favor of certain powerful States in the field of aviation, or from an inherent reluctance or inability to grapple with judicial issues, or even from its lack of uniformly applied procedures, the fact remains that the Council's decision is precisely the kind of decision which the Court should consider on appeal in exercising its supervisory powers over ICAO pursuant to Article 84 of the Chicago Convention. The need for the Court's review is compelling when there so evidently existed a disagreement between the Islamic Republic and the United States over the interpretation or application of substantive provisions of the Chicago Convention which was decided on by the Council, where the requirements of Article 84 have been met, and where the United States' objections to jurisdiction are of a purely formalistic nature. With regard to such formalistic objections, it is appropriate to recall the words of the distinguished jurist Charles De Visscher, recently referred to by Judge Shahabuddeen at page 22 of his Separate Opinion in the Case Concerning Certain Phosphate Lands in Nauru:

> "The temptation to formalism, and the proneness to generalization by abstract concepts and to premature systematization, represent one of the most serious dangers to which international-law doctrine is still exposed ... International justice especially must maintain a

proper relationship between social data and the rules designed to govern them[1]."

11. With respect to the Montreal Convention, the United States' argument that the Islamic Republic failed to satisfy the jurisdictional prerequisites of Article 14(1) by not having sought to resolve the dispute through negotiation or arbitration does not stand up to scrutiny. Prior to the filing of the Islamic Republic's Application, the United States had an explicit policy not to deal with the Government of the Islamic Republic on the matter, including on the issue of compensation. Official U.S. State Department communications confirm that the United States insisted on avoiding any Iranian "interference" in the matter. Moreover, the prospect of negotiating with the Islamic Republic regarding Flight IR 655 was not perceived by either the executive or legislative branches of the U.S. Government as a viable alternative. Bearing in mind that the two States did not then, and still do not, maintain diplomatic relations, the possibility of fruitful negotiations leading either to settlement or to arbitration was, in the circumstances, virtually nil. For these reasons, it is untenable for the United States to allege that the Islamic Republic "has deliberately avoided normal diplomatic practice[2]". It is the United States which was unwilling to discuss the matter with the Government of the Islamic Republic.

12. In addition, ever since the incident occurred, the United States has made it clear that it refuses to consider the attack on Flight IR 655 as anything other than a legitimate act of self-defense. The Islamic Republic has contested this view before both ICAO and the United Nations Security Council. The positions of the Parties being so totally irreconcilable, international law does not impose an obligation for further negotiations in order to bring the dispute

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[1] De Visscher, C.: Theory and Reality in Public International Law, tr. P.E. Corbett, 1968, p. 143.

[2] U.S. Preliminary Objections, p. 5.

before the Court, particularly when one of the States (the United States) has not even recognized the rights of the other in the matter and when parliamentary forms of diplomacy before international organizations have been unable to bridge their differences. In short, the obligation to negotiate is not absolute but rather depends on the relevant facts and circumstances of each particular case.

13. As for the assertion that the Islamic Republic's claims fall outside the scope of the Montreal Convention because the Convention does not apply to the acts of States or State agents (such as members of the armed forces) against civil aircraft, this is no more than a petitio principii. Such arguments may reflect the United States' position as to the interpretation or application of the Convention, but this is a question which the Court is called upon to decide at the merits stage of the proceedings. The United States' thesis thus serves only to provide further evidence that a dispute exists between the Parties over the interpretation or application of specific provisions of the Convention, including Article 1 which plainly states that the Convention applies to any person in the broadest sense of the term.

14. With respect to the Treaty of Amity, the arguments presented by the United States suffer from many of the same defects. Given the divergent positions of the Parties on liability, obviously a dispute exists over the interpretation or application of the Treaty's provisions, particularly Article 1 (calling for peace and friendship between the countries), Article IV(1) (providing that the nationals of the Islamic Republic be accorded "fair and equitable treatment") and Article X(1) (providing for freedom of commerce and navigation). The mere fact that the Islamic Republic only invoked the Treaty of Amity in its Memorial has in no way changed the fundamental nature of the case introduced in its Application. That case remains based on the events leading up to the destruction of Flight IR 655 and the shoot-down itself. Thus, there are no

grounds for holding that the Islamic Republic is somehow estopped from invoking the Treaty at this stage of the proceedings.

15. In addition, contrary to what the United States says, the Treaty of Amity's compromissory clause (Article XXI(2)) does not require that negotiations are a pre-requisite to bringing a case under the Treaty. All that is required, as several members of the Court confirmed in the jurisdictional phase of the Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (the "Nicaragua case"), in connection with an identical compromissory clause in a treaty between Nicaragua and the United States, is that the dispute be one "not satisfactorily adjusted by diplomacy". Such a situation undoubtedly exists in the present case. Moreover, even if an attempt to negotiate had been required, the United States' categorical refusal to deal with, or to allow any "interference" by, the Government of the Islamic Republic on the matter, or even to recognize the interests of the Islamic Republic relating to the shoot-down, would preclude the United States from raising the issue now as a bar to jurisdiction.

16. Finally, it will be necessary to comment on the United States' extraordinary accusation that the Islamic Republic is invoking the Treaty of Amity in bad faith. For over ten years, the United States has consistently taken the position that the Islamic Republic is barred from repudiating the Treaty. The United States adopted this position because it was relying on the Treaty and wished to reap its benefits in both the Case Concerning United States Diplomatic and Consular Staff in Tehran (the "Diplomatic and Consular Staff" case) before this Court and numerous other cases before the Iran-United States Claims Tribunal. Now the United States has reversed its position, insisting that the Islamic Republic is barred from invoking the Treaty. Having successfully relied

on the Treaty over the past decade in cases where it was the claimant, the United States now seeks to preclude the Treaty's application where it is the respondent.

17. Such a volte face finds no support in law and is manifestly unacceptable. If ever there was an example of a State "blowing hot and cold", this is it. The equal application of justice demands that the United States be held to the same standards under the Treaty as have been applied against the Islamic Republic in other cases. The fact is that the Treaty of Amity provides a solid basis of jurisdiction in this case - a conclusion entirely supported by the Court's decisions in both the Nicaragua and the Diplomatic and Consular Staff cases.

18. All of these considerations lead the Islamic Republic to submit that under Article 79(7) of the Rules of Court, the Preliminary Objections must be rejected with respect to all three bases of jurisdiction. Subsidiarily, however, the Islamic Republic calls the Court's attention to the fact that many of the United States' arguments, especially those that relate to the Montreal Convention and the Treaty of Amity, are directed to the merits of the case. Consequently, if, contrary to the Islamic Republic's principal submission, the Court concluded that it could not reject the United States' Preliminary Objections in limine at this stage of the proceedings, it would still be open for the Court to declare that, in the circumstances of the case, the objections raised do not possess an exclusively preliminary character.

19. In either event, it is clear that this case raises important issues relating to the interpretation or application of all three conventions. Because of their importance not only to the Parties, but also to the safety of international air navigation and commerce in general and in order to ensure the payment of due compensation, there are compelling reasons for the Court to address these issues on the merits.

20. The Court's jurisprudence demonstrates that the Court has solid jurisdictional grounds for tackling all of the issues raised and that in similar circumstances in the past the Court has not hesitated to exercise its jurisdiction. For States such as the Islamic Republic that are not superpowers, recourse to the Court remains their best hope for resolving international legal disputes on the basis of procedural due process and respect for the rule of law. When States have consented to the Court's jurisdiction to resolve disputes over the interpretation or application of international agreements, the Court should exercise that jurisdiction.

CHAPTER II THE STRUCTURE OF THESE OBSERVATIONS

21. These Observations are submitted in three volumes. Volume I contains the Observations themselves and is divided into seven Parts following this Introduction.

22. Part I deals with the overall deficiencies of the U.S. Preliminary Objections and explains how they do not rise to the level of legitimate preliminary objections, *stricto sensu*, under Article 79 of the Rules, but rather constitute defenses to the merits.

23. Parts II and III then take up some of the factual issues in the case. It is not the Islamic Republic's intention to plead the merits of the case at this stage; however, it is necessary to restore some balance to the very selective and one-sided account of the "facts" given in the U.S. Preliminary Objections, particularly to the extent that they have a bearing on the jurisdictional issues and in the light of the recent evidence that has emerged confirming that the United States was engaged in a policy designed to provoke the Islamic Republic and that the *Vincennes*, and its helicopter, penetrated Iranian territorial waters to pursue acts of aggression against the Islamic Republic on the day of the incident.

24. After addressing these matters in Part II insofar as they relate to the events leading up to and including the destruction of Flight IR 655 on 3 July 1988, Part III will then discuss the relevant facts following the incident including the question of negotiations between the Parties, the crystallization of the dispute, and the legal principles underlying the question of negotiations.

25. Thereafter, Parts IV, V and VI will address the individual bases of jurisdiction provided for under Article 84 of the Chicago Convention (Part IV), Article 14(1) of the Montreal Convention (Part V) and Article XXI(2) of the Treaty of Amity (Part VI). The Observations then end with the Islamic Republic's conclusions and submissions in Part VII.

26. Volumes II to IV contain additional documentary exhibits that are referred to in the course of these Observations. For the convenience of he Court, these include both new documents and some of the more relevant documents relating to the jurisdictional issues that have already been supplied by he Parties.

PART I

UNDER ARTICLE 79 OF THE RULES OF COURT, THE PRELIMINARY OBJECTIONS SHOULD EITHER BE REJECTED OR DECLARED NOT TO POSSESS AN EXCLUSIVELY PRELIMINARY CHARACTER

1.01 The United States has filed its Preliminary Objections pursuant to Article 79 of the Rules of Court. In those Objections, the United States requests the Court to address the issue of jurisdiction before taking up the merits of the case[3].

1.02 This request presents the United States with a dilemma. On the one hand, the United States is anxious to introduce its version of the events surrounding the destruction of Flight IR 655 in order to justify its actions. To this end, the United States spends some 70 pages of its pleading discussing the facts, even to the extent of trying to justify its issuance of what were clearly illegal NOTAMS and of introducing copious materials relating to attacks on shipping in the Persian Gulf, neither of which have any relevance to its jurisdictional objections.

1.03 On the other hand, the more the United States discusses the facts of the case, the more this serves to point up how its objections are principally concerned with the merits of the case, not with strictly jurisdictional issues. Consequently, in order to avoid this dilemma, the United States seeks to have the best of both worlds: arguing a number of issues on the merits while maintaining that this is necessary under Article 79(6) of the Rules in order to dispose of the jurisdictional issues at a preliminary stage without joining the objections to the merits. On this latter point, the United States goes to great pains to show that the 1972 revision of the Rules was designed to encourage the Court to address all legal and factual questions bearing on jurisdiction, even if they touch on the merits, at a preliminary stage of the proceedings. There are several flaws in the United States' line of argument which will be discussed below.

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[3] U.S. Preliminary Objections, p. 75.

CHAPTER I ARTICLE 79(7) OF THE RULES AUTHORIZES THE COURT TO ORDER FURTHER PROCEEDINGS IF THE PRELIMINARY OBJECTIONS ARE EITHER REJECTED OR DECLARED NOT TO POSSESS AN EXCLUSIVELY PRELIMINARY CHARACTER

1.04 Under Article 79(7) of the Rules, the Court has three avenues open to it when confronted with preliminary objections. The Court may either (i) uphold the objection; (ii) reject it; or (iii) declare that it does not possess, in the circumstances of the case, an exclusively preliminary character.

1.05 For the reasons that will be explained in the following Parts, he Islamic Republic believes that there are overwhelming grounds for the Court o adopt the second approach - to reject the United States' Preliminary Objections at this stage of the proceedings. Nevertheless, it does not follow from his, as the United States would have the Court believe, that simply because an objection might not be rejected at this stage it necessarily must be upheld in a preliminary judgment. As the Court recognized in its judgment on the urisdictional issues in the Nicaragua case, it is perfectly possible (as indeed happened in that case) that particular objections may be held not to have an exclusively preliminary character" and thus not to constitute an obstacle for the Court to entertain the proceedings brought by the application on the merits[4]. In uch a situation, Article 79(7) obliges the Court to fix time-limits for the further proceedings (i.e., the merits) in the case.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 425-426, para. 76.

1.06 While the actual language of Article 79(7) of the Rules may no longer expressly refer to the possibility of joining the jurisdictional issues to the merits, it is difficult to see what other alternative would be available for an objection that is declared not to have an "exclusively preliminary character". As the former President of the Court, Judge Jiménez de Aréchaga, wrote, in such circumstances "[i]t would then be for the Respondent to raise such a defense at the stage of the merits, if it so wished[5]".

1.07 One striking aspect of Article 79(7) is its provision that the Court shall fix time-limits for the further proceedings if the Court either rejects the preliminary objection or declares that it does not possess an exclusively preliminary character. The mandatory nature of the word "shall" coupled with the use of the word "exclusively" suggests that this criterion must be strictly interpreted. Thus, if there is any possibility that an objection which is not rejected at the preliminary stage is so intertwined with the merits of the case that it is not *exclusively* preliminary, it must be deferred to the "further proceedings"[6].

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[5] Jiménez de Aréchaga, E: "The Amendments to the Rules of Procedure of the International Court of Justice", 67 Am. J. Int'l L. (1973), at p. 17. Exhibit 1. See, also, Dissenting Opinion of Judge Schwebel in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 613.

In this connection, reference may also be made to the opinion of Professor Rosenne who notes:

"The puzzle that the new version sets ... is whether the effect of the new provision is to abolish the option of joining an objection to the merits, thus wiping out a virtually constant jurisprudence itself corresponding to a widely felt need, or whether the holding that the objection does not, in the circumstances, possess an exclusively preliminary character simply means that it is not admissible as a preliminary objection. In that event, such a holding would be the equivalent of joining it to the merits, perhaps in the technical classification of a plea in bar, while not requiring the Court to deal with it specifically in the operative clause of the judgment." Rosenne, S.: Procedure in the International Court, Martinus Nijhoff, The Hague, 1983, p. 165. Exhibit 2.

1.08 Notwithstanding their other deficiencies, a number of the United States' objections run afoul of this provision. Reference may be made, for example, to the United States' argument that the Treaty of Amity has nothing to do with the shooting down of Flight IR 655 because it is purely a commercial treaty which does not preclude measures taken by a party to protect its essential security interests. In Part VI, the Islamic Republic will show that under the Court's prior jurisprudence these contentions cannot be sustained. Yet even if there was some merit to the argument, it would still be so inextricably linked with the merits of the case - the interpretation or application of the Treaty of Amity with respect to the shooting down of Flight IR 655 - that it could not be said to have "an exclusively preliminary character". In such circumstances, it would fall upon the Court to proceed to the merits of the case.

1.09 The same can be said about the United States' contentions regarding the scope of the Montreal Convention, particularly whether it applies to State actions or the acts of military forces against civil aircraft. Even accepting, *arguendo*, that such arguments present a legitimate jurisdictional question, it cannot be said that they possess an "exclusively preliminary character" given that the whole question concerning the scope of the Convention is linked to issues that the Court must decide on the merits: namely, the interpretation or application of

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[5] *See*, Ago, R.: "Eccezioni non esclusivamente preliminari" in *Il Processo Internazionale, Studi in onore di Gaetano Morelli*, Giuffré, 1975, p. 13. *See*, also, Jiménez de Aréchaga, *supra*, at p. 17, where the author notes that:

> "If ... the objection that has been raised by a party as preliminary is so intertwined with elements pertaining to the merits that a hearing of those issues would siphon off into the preliminary stage the whole of the case, then the Court would declare that, in the circumstances, the objection raised as preliminary does not really possess such a character".

the Convention. Accordingly, such an objection cannot operate as a bar to jurisdiction at this stage, and the Court would in any event be obliged to proceed with the "further proceedings" in the case[7].

CHAPTER II ARTICLE 79(6) IS NOT RELEVANT TO THE U.S. OBJECTIONS

1.10 There is a further weakness to the United States' argument in so far as it is based on Article 79(6) of the Rules. In essence, the United States relies on this provision as an excuse for treating factual questions that are actually directed to the merits of the dispute. However, this tactic rests on a misinterpretation of the Article in question. Article 79(6) states that:

> "In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the Parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue."

1.11 As plainly stated, Article 79(6) enables the Court to request the Parties to argue certain factual or legal questions bearing on the jurisdictional issues. In the present case, however, the Court has made no such request, so the provisions of Article 79(6) can hardly justify the United States' detailed treatment of the facts in its pleadings. Moreover, there is no need for the Court to make such a request since it is readily able to decide the jurisdictional issues in the case on the basis of the procedural record before it and the compromissory clauses themselves, without having to address factual matters that are inseparable from the merits of the case.

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[7] In this connection, it is useful to bear in mind the definition of a preliminary objection offered by Judges de Visscher and Rostworowski in their Joint Separate Opinion in the Panevezys-Saldutiskis Railway case:

> "... an objection is prima facie preliminary when, by its nature or its purpose, it appears directed against the judicial proceedings, that is, against the conditions governing the institution of the proceedings and not against the law on which they rest. In order, however, that it may definitely be granted this character, it is necessary in each case to weigh the arguments cited in its support. The objection will be treated either as preliminary or as a defence of the merits, according as these arguments may or may not prejudge the justice or injustice of the claim." Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J. Series A/B, No. 76, p. 24.

1.12 The situation is simply the following: the purely procedural objections to the Court's jurisdiction raised by the United States - such as that the Islamic Republic failed to negotiate the dispute, or that it failed to adhere to the procedural rules relating to the bringing of a dispute before the ICAO Council under Article 84 of the Chicago Convention, or that it is estopped from invoking the Treaty of Amity because of its past conduct - can be disposed of at this stage without any reference to the merits. The other objections raised by the United States - relating to whether or not the Islamic Republic's claims fail to have more than a "remote connection" with either the Montreal Convention or the Treaty of Amity - are neither valid nor possess an exclusively preliminary character. Either way, these objections cannot be upheld as genuine preliminary objections under Article 79.

CHAPTER III THE SCOPE OF THE UNITED STATES' CONSENT TO JURISDICTION

1.13 The United States then shifts its argument and asserts that it has not consented to the Court's jurisdiction in this case within the meaning of Article 36(1) of the Statute[8]. This allegation also falls wide of the mark, as a review of the relevant facts readily reveals.

1.14 There is no dispute between the Parties that both of them are parties to all three treaties invoked by the Islamic Republic, and that these treaties remain in force between them. Similarly, it is undisputed that all three treaties contain compromissory clauses that vest jurisdiction in the Court to decide disputes between the parties as to their interpretation or application. This is important because it defines the scope of what the United States consented to. By becoming a party to the treaties in question, the United States agreed in principle that disputes over their interpretation or application could be submitted to the Court for adjudication either directly, or in the case of the Chicago Convention, on appeal from a decision of the ICAO Council.

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[8] U.S. Preliminary Objections, pp. 80-81.

1.15 Nonetheless, the United States argues that it cannot be presumed to have consented to jurisdiction just because another State asserts that a particular dispute arises under one of these treaties. Borrowing from the Court's words in the Ambatielos case, the United States asserts that it is not sufficient for there to be a "remote connection" between the facts of the Islamic Republic's claims and the treaties in question; there must be a "reasonable connection"[9].

1.16 Notwithstanding that the "reasonable connection" test is not one that has been specifically endorsed by the Court, the Islamic Republic will show that not only is there a "reasonable connection" between the above-mentioned treaties and the facts of this case, but that there have been express violations of these treaties as well. In so doing, it must be borne in mind that these issues are not matters to be addressed at the jurisdictional stage since they do not, strictly speaking, possess an exclusively preliminary character. Any assessment of the United States' arguments would require a full analysis by the Court of the facts of the case and an interpretation and application of the treaties in the light of the facts. Such issues are precisely those which come within the jurisdiction of the Court pursuant to the terms of the compromissory clauses invoked by the Islamic Republic.

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[9] Ibid., p. 83.

1.17 The United States' confusion on this point rests on a fundamental mischaracterization of the findings of the Court in the three cases on which it relies[10]. In the Ambatielos case, for example, the Court found that it had jurisdiction to decide whether the United Kingdom was under an obligation to submit to arbitration a dispute brought by the Royal Hellenic Government on behalf of Mr. Ambatielos. The compromissory clause in that case provided that claims had to be "based on" the 1886 treaty which formed the basis of jurisdiction. The issue on the merits was thus whether Mr. Ambatielos' claims were "based on" the 1886 treaty, and whether they could be submitted to arbitration. In the circumstances of the case, the Court found that Greece had to show a "sufficiently plausible" (not a "reasonable") connection between the claim and the treaty in order to establish that the claim was "based on" the treaty[11].

1.18 The difference between Ambatielos and the present case is self-evident. Unlike in the 1886 treaty at issue in Ambatielos, there is no requirement in the compromissory clause of either the Treaty of Amity, the Montreal Convention or the Chicago Convention that a prior showing must be made that a claim is "based on" these treaties. To the contrary, the compromissory clauses of all these treaties cover disputes over their interpretation or application, and thus the very issue of whether a claim falls within the scope of the treaties is a matter within the jurisdiction of the Court, not a matter that has to be established before the Court's jurisdiction can be upheld. This being said, the Islamic Republic will still show that there is much more than a reasonable connection between its claims and the treaties involved.

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[10] See, U.S. Preliminary Objections, pp. 81-83.

[11] Ambatielos, Merits, Judgment, I.C.J. Reports 1953, at p. 18.

1.19 The same point applies to the United States' reference to the Court's advisory opinion in the Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO case. In that case, the Court noted that the Administrative Tribunal was only competent to hear complaints by an official alleging non-observance of the terms or provisions of certain contracts. The Court found, however, that given the specific terms of the clause governing the competence of the Administrative Tribunal, it was necessary to establish as a prior matter a substantial, not merely artificial, connection between the allegations and the provisions relied on. Again, this case is not applicable to the present situation where all such issues are within the Court's jurisdiction inasmuch as the parties have consented that all disputes relating to the interpretation or application of the treaties invoked can be submitted to the Court. Moreover, the connection between the Islamic Republic's claims and the treaties at issue will be seen to be well established.

1.20 Finally, the United States refers to a third case: the jurisdictional phase of the Nicaragua case. This case did involve a treaty very similar to the Treaty of Amity where the compromissory clause vested jurisdiction in the Court to decide questions of interpretation or application. The United States cites a statement in the Court's judgment to the effect that Nicaragua "must establish a reasonable connection between the treaty and the claims submitted to the Court", in order to buttress its allegation that the Islamic Republic must make a similar showing here[12].

1.21 Two comments may be made about this citation. First, the reference given is to a part of the Court's judgment where the Court was recapitulating the United States' own argument, not stating its independent view s to the extent of the nexus between the claims and the Treaty that was required or jurisdictional purposes. In rejecting the United States' position on this issue, he Court made no suggestion that a test such as that advocated by the United States had to be satisfied[13]. *Second*, there clearly is in any event a "reasonable" - ndeed, intimate - connection between the claims of the Islamic Republic and the reaties invoked here. As the Court made clear in its judgment in the *Nicaragua* ase, the question whether the use by one State of armed force against the erritorial sovereignty of another State constitutes a breach of substantive rovisions of a treaty such as the Treaty of Amity gives rise to a question of nterpretation or application of the treaty in question. As the Court stated -

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[12] U.S. Preliminary Objections, p. 83 and fn. 1 thereto.

> "... for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that in the circumstances in which [the Application was brought], and on the basis of the facts there asserted, there is a dispute between the Parties, *inter alia*, as to the 'interpretation or application' of the Treaty[14]".

1.22 The same considerations apply to the Montreal Convention. On its face, Article 1 of the Montreal Convention applies to *any* person involved n the offenses against civil aircraft mentioned therein. No exception is made nywhere in the Convention for persons acting on behalf of a State, and thus for State actions or the acts of armed forces. *Prima facie*, therefore, the Islamic Republic's claims relating to the destruction of one of its civil airliners by the crew f the *Vincennes* have at least a reasonable connection to the Convention. The urden of proof is on the United States to show otherwise; but this is a burden to e satisfied at the merits stage of the proceedings since it relates to the very subject matter of the Court's jurisdiction - the interpretation or application of the Montreal Convention.

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[13] *See*, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 427-429, paras. 81-83.

[14] *Ibid.*, p. 428, para. 83.

1.23 It follows that even if a "reasonable connection" test has to be met, it has been satisfied by the Islamic Republic with respect to its claims in this case. As such, there are no grounds for upholding the Preliminary Objections under Article 79 of the Rules of Court.

PART II

FACTUAL ISSUES RELEVANT TO THE PRESENT PROCEEDINGS

2.01 There are three reasons why the facts of this case should be heard by the Court. First, the true story of what happened on 3 July 1988 has never been told by the United States and this case offers perhaps the last chance for a full disclosure of the facts. Second, despite its jurisdictional objections, the United States has shown itself willing in its Preliminary Objections to enter into all aspects of the merits of the case. Third, and perhaps most important for the present stage of the proceedings, the Parties have consented to the Court's jurisdiction over the merits under the relevant compromissory clauses of the Chicago and Montreal Conventions and the Treaty of Amity.

2.02 Significantly, the United States' version of what happened on 3 July 1988 has changed with every telling. Different versions have been presented at different times to the public, to the press, to the United States Congress, to the U.N. Security Council and to the Council of ICAO. With every new version, the United States has been forced to revise its story. In an article published in July of this year, Newsweek magazine summed up the different "official" versions of the incident in its headline - a "Sea of Lies[15]".

2.03 Still another version has been presented to the Court in the statement of facts set out in Part I of the United States' pleading. As the Islamic Republic will show below, this version contains half-truths, misrepresentations and inaccuracies similar to all the other versions. In particular, the United States misrepresents the role of the U.S. forces in the Persian Gulf, misrepresents the actions of forces of the Islamic Republic prior to and on the day of the incident, and gives an incomplete and inaccurate version of the incident itself.

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[15] Newsweek, 13 July 1992. Exhibit 3.

2.04 Moreover, new evidence about the incident, some of which has only come to light in the last few months, not only contradicts the official U.S. version of events (insofar as such exists), but effectively substantiates the factual presentation that has been made by the Islamic Republic since the date of the incident.

2.05 In this regard, one important event of which the Court will be well aware is the finding of the Secretary-General of the United Nations in his Report of 9 December 1991 that Iraq started and must bear responsibility for the 8-year war which caused such terrible suffering and cost hundreds of thousands of lives[16]. Despite his finding, the United States seeks to portray the Islamic Republic as the guilty party in the war. It totally ignores the fact that Iraq had started the war, invading a considerable part of Iran, a fact that was well-known at the time. It also ignores Iraq's use of chemical weapons[17], and that Iraq initiated attacks on neutral shipping in the Persian Gulf[18]. These facts, taken together with the Secretary-General's report, confirm that the United States' presentation of the Islamic Republic's role in the war is inaccurate. It is designed only to color the case and to distract attention from the main issues.

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[16] Further Report of the Secretary-General on the Implementation of Security Council Resolution 598 (1987), 9 December 1991, U.N. Doc. S/23273. Exhibit 4.

[17] A fact confirmed in the Report of the Mission Dispatched by the Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between the Islamic Republic of Iran and Iraq, 19 August 1988; U.N. Doc. S/20134, p. 5. Exhibit 5.

[18] See, para. 2.37 below.

2.06 The Secretary-General's Report is also significant because it shows that the United States' hostility towards the Islamic Republic throughout the imposed war was totally unjustified. Further evidence has recently come to light revealing that the U.S. Government endorsed a policy of direct military and financial assistance to Iraq and of military action against the Islamic Republic. This evidence is of direct relevance to the incident of 3 July 1988 in as much as it shows that the United States was predisposed to adopt an aggressive position against the Islamic Republic and its shipping and commercial air operations.

2.07 New evidence concerning the events of 3 July 1988, much of which was only made public in July of this year, also suggests a very different version of the facts than the United States has hitherto sought to portray. On the other hand, this new evidence substantially confirms the presentation of the facts that the Islamic Republic has made since the date of the incident in the statement of Mr. Velayati, the Minister of Foreign Affairs of the Islamic Republic, before the U.N. Security Council, in the Islamic Republic's presentations before the ICAO Council, and in its Memorial before the Court. This evidence shows that -

- Statements to the Security Council in 1988 by Vice-President Bush that the U.S. forces went to assist a neutral vessel on 3 July 1988 were false - it is now admitted that no neutral vessels were being "threatened" in any way by Iranian small patrol boats on the day of the incident and none sought U.S. assistance;

- Statements by President Reagan to Congress that the U.S. vessels were operating in international waters at the time of the shoot-down were false - it has now been admitted that U.S. forces intruded into Iranian territorial waters in order to pursue and harass Iranian small patrol boats just prior to the shoot-down;

- Repeated statements that the U.S. forces acted in self-defense are false - it now appears that the U.S. forces launched a direct attack on the Iranian small patrol boats on the day of the incident;

- Despite the admission in the United States pleading that the Vincennes was within the Islamic Republic's territorial waters when it shot down Flight IR 655, the United States has never been honest about the positions of its vessels or its helicopters at various times of the incident - it appears that this is because each of these vessels was violating the Islamic Republic's territorial sovereignty prior to the incident itself and prior to any engagement with Iranian small patrol boats.

2.08 All of these points will be discussed further in the following Chapters. The Court is invited to pay particular attention to the Newsweek article and the transcript of the ABC Nightline programme included in Exhibit 3 and Exhibit 6 hereto, and the statements of U.S. government and military officials made therein[19]. Although these are media reports, the Court will note that the writers have had access to unique sources of information. The Court will also note that a very substantial part of the United States' factual presentation in its pleading is based on newspaper articles. Most importantly, it appears that the United States has made no coherent attempt to dispute any of this new evidence.

2.09 The Islamic Republic understands that, in the light of the Newsweek and ABC Nightline stories, a further investigation of the incident is now under way in the United States conducted by the House Armed Services Committee. The fact that such an investigation has been found necessary, implying that the Government is not sure of its own version of the events, undermines the United States' rejection of responsibility for the incident. It also makes a mockery of the United States' protestations that it conducted a full, open investigation of the incident, in the form of the Defense Department Report, which was presented to ICAO[20].

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[19] As noted, a copy of the transcript of the ABC Nightline programme is included as Exhibit 6. However, a videotape of the full programme has also been deposited with the Registry pursuant to Article 50(2) of the Rules of Court. The Islamic Republic does not of course accept every statement made in Exhibits 3 and 6 and only relies on them to the extent specifically indicated in this pleading.

2.10 The United States' failure to tell the whole truth about this incident is not only an abuse of international organizations like the Security Council, the ICAO Council and the Court itself, to whom the various versions of the story have been told, it is also an abuse of the rights of the 290 innocent victims. The proceedings before the Court are perhaps the last opportunity for the full story to be told and for the victims and the Islamic Republic to obtain proper redress from the United States together with a full acknowledgment of esponsibility.

2.11 If the United States genuinely believes that as a matter of aw it has no responsibility for the incident, it should have no reason to prevent a ull airing of the facts. However, the consideration of this new evidence is omething the United States gives every appearance of wanting to avoid. It asks he Court "to accept the report of the ICAO investigation as an authoritative inding with regard to the incident of 3 July 1988[21]", arguing that any issue of fact can be resolved on the basis of the extensive public record of the proceedings of he ICAO on this matter[22]". This argument is without basis as a matter of fact nd law.

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[0] The U.S. Defense Department Report is Appendix E to the ICAO Report. See, Exhibit 4 to the Memorial of the Islamic Republic. See, also, U.S. Preliminary Objections, pp. 52-55. The United States characterization of this report as "candid" is beyond belief, given that its conclusions were misleading and/or quite incorrect and that it has only been made available in a heavily censored form.

[1] U.S. Preliminary Objections, p. 66, fn. 1.

[2] Ibid., p. 83, fn. 2. As will be seen in Part IV below (see, paras. 4.53 to 4.55) this is an extraordinary argument because it totally contradicts the United States' position that the ICAO Council only conducted an investigation into the technical aspects of the incident and did not make nor was intended to make legal findings on the main factual issues.

2.12 First, it is now clear that ICAO was not given an accurate version of the facts. Second, the United States' own presentation of the facts is not restricted to the ICAO Report. A myriad of new exhibits is introduced, including press materials and U.S. policy papers, which relate to issues hardly touched on in the ICAO Report. Third, what the United States means by the ICAO Report is generally not the report prepared by the ICAO investigation team, but the one-sided and heavily censored Report prepared by its own Defense Department which is Appendix E to the ICAO Report. In the light of recent evidence, it is now clear that this Defense Department Report was misleading in its presentation of the events and incorrect in its conclusions.

2.13 It should anyway be recalled that there is no reason in law why the Court should not hear all of the facts relating to the incident de novo. There is thus no justification for the argument that an appeal from an ICAO decision should be limited to the facts of the case as presented to ICAO, and the United States cites none[23]. Moreover, where different treaties are under consideration that were not considered by the ICAO Council (i.e., the Treaty of Amity and the Montreal Convention) and where new facts have been discovered which might have significantly affected the Council's decision, there can be no basis for restricting the scope of the Court's review.

2.14 The approach of the United States in this case is inappropriate not only because of its inaccurate version of the facts but also because the United States has sought in its Preliminary Objections to make a full presentation of its version of the facts while, at the same time, it has sought to prevent a full hearing of the case based on purely formalistic objections.

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[23] See, Lauterpacht, E.: "Aspects of the Administration of International Justice" in Hersch Lauterpacht Memorial Lectures, Cambridge, Grotius Publications, 1991, p. 106. Exhibit 7. Referring to the Court's ruling in Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J Reports 1972, Lauterpacht notes that: "...although there was no discussion of what was meant by the idea of 'appeal', the Court proceeded to determine de novo on its merits the competence of the ICAO Council, there being no suggestion that the concept of 'appeal' meant anything less."

2.15 In raising preliminary objections, a State may in some cases have an interest in, and justification for, limiting the Court's power to hear all the facts of a case. In this case no such justification exists. Not only did the United States widely publicise its version of the facts prior to the institution of these proceedings, but in its pleading it also makes a detailed presentation on all relevant issues, including issues relating to the war imposed on the Islamic Republic by Iraq, the role of the United States' forces in the Persian Gulf, the problems of commercial maritime and air traffic in the Persian Gulf, and the NOTAMs issued by the United States[24]. It also presents a new version of the shooting down of Flight IR 655, the prior engagement with Iranian small patrol boats and the alleged warnings given by the Vincennes.

2.16 In making such a detailed presentation, the United States takes issue with virtually all aspects of the statement of facts made in the Islamic Republic's Memorial which addressed the merits of the case[25]. The United States thus shows that the Parties continue to have opposing positions concerning most of the main factual issues and their legal significance, and that a dispute continues to exist with regard to these issues.

2.17 The United States has also presented the main aspects of its defense on the merits of the case. It seeks to justify its military presence in the

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[24] This latter issue is discussed in detail in Annex 2 to the U.S. Preliminary Objections.

[25] The United States' presentation of the facts, including Annexes 1 and 2 to its pleading, is even longer in terms of number of pages than the Islamic Republic's presentation in its Memorial on the merits.

Persian Gulf and its interference in commercial maritime and air traffic on the grounds that they constituted "essential security measures" within the terms of Article XX(1)(d) of the Treaty of Amity. Similarly, with respect to the shoot-down, the United States presents all the facts relevant to its self-defense argument while at the same time calling into question the responsibility of the Islamic Republic in the incident.

2.18 The United States makes no attempt to explain the relevance of this factual discussion to the objections to jurisdiction raised in other parts of its pleading. Although the United States asserts that "many of the factual assertions made by Iran need not be addressed at this time by the Court"[26], it neither distinguishes which facts are relevant nor in relation to which jurisdictional issue they might be relevant, if at all. This last is a requirement implicit in Article 79(5) of the Rules of Court, which provides that "statements of fact ... in the pleadings ... shall be confined to those matters that are relevant to the objection". As pointed out in Part I above, the United States seeks the best of both worlds, arguing merits issues, while at the same time attempting to restrict the Court's consideration of the merits. Moreover, by arguing the facts at the same time as it asks the Court to dismiss the case on jurisdictional grounds, the United States effectively seeks a summary judgment on the merits, without allowing the Court, or the Islamic Republic, to examine fully the facts and the law, which properly belong to a later stage of the proceedings. This is totally inappropriate, and in considering the United States' jurisdictional objections the Court should bear in mind the United States' willingness to delve into the merits of the case.

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[26] U.S. Preliminary Objections, p. 9.

2.19 A response to the United States' version of the facts is thus necessary for two main reasons: first, to correct the numerous misrepresentations of factual issues by the United States, shown, not least, by new evidence which directly supports the Islamic Republic's explanation of the facts of this incident; and second, because the United States has shown itself willing to enter into the facts of this case in detail. The Islamic Republic will seek to correct the inaccurate version of events portrayed by the United States. However, this is not meant to be (nor should it be) a detailed rebuttal of all the factual statements made by the United States and, unlike the United States, the Islamic Republic will seek to relate its factual discussion to the relevant jurisdictional issues in the case.

2.20 In Chapter I below, the Islamic Republic will discuss the relevance of the period prior to the shoot-down of Flight IR 655. In Chapter II the shoot-down itself is discussed, while Chapter III contains a conclusion showing the relevance of these facts to the jurisdictional issues.

CHAPTER I THE FACTS RELATING TO THE PERIOD PRIOR TO THE SHOOT-DOWN OF FLIGHT IR 655

2.21 This Chapter discusses the period prior to the incident and focusses on the United States' allegations that the Islamic Republic has somehow expanded its complaint by introducing facts relating to the background situation in the Persian Gulf. It will be shown below that this allegation is incorrect as a matter of fact (Section A), that facts relating to the background situation in the Persian Gulf are directly relevant to an understanding of the shoot-down (Section B), and that, in any event, part of the dispute submitted by the Islamic Republic to the Court in its Application concerned events that occurred prior to the incident (Section C).

SECTION A. The Islamic Republic Has Not Expanded Its Complaint by Introducing Background Facts from the Period Prior to the Shoot-down

2.22 The United States maintains that the dispute submitted in the Islamic Republic's Application "arose from a single incident: the destruction of an Iranian aircraft by a United States warship[27]". The United States then asserts that, in its Memorial, the Islamic Republic "expands its complaint to cover the effect of U.S. military deployments in the [Persian] Gulf, and of other U.S. actions not involving military force, on the commercial relations of Iran and the United States over an extended period of time[28]". This assertion is without merit.

2.23 It is quite obvious that the shoot-down of Flight IR 655 cannot be fully understood without reference to the situation in the Persian Gulf prior to the incident. To this end, the Islamic Republic introduced in its Memorial facts showing the clear breaches of the laws of neutrality by the United States during the Iran/Iraq war, the hostile attitude shown by U.S. military forces towards Iranian forces, the continuous interference by these forces in Iranian commercial traffic, the United States' issuance of the illegal NOTAMs, and the U.S. military forces' lack of coordination with civil aviation authorities in the region. These facts are all directly relevant to a full understanding of the shoot-down. They explain why U.S. forces barged into Iranian territorial waters on 3 July 1988, provoked Iranian forces and were predisposed to treat Flight IR 655 as hostile and fire on it[29].

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[27] U.S. Preliminary Objections, pp. 218-219.

[28] Ibid., pp. 219-220. For the sake of clarity, the full term "Persian Gulf" is used throughout this pleading in conformity with the relevant Un Secretarial Note No. AD311/1 GEN (5 March 1971); UN Secretarial Editorial Directive No. ST/CS/SER. A29 (10 January 1990), Exhibit 7A.

[29] See, paras. 2.48-2.51 below.

2.24 In total contradiction of its argument that the Islamic Republic is guilty of expanding its complaint by introducing such facts, the United States acknowledges their relevance in the very first page of its own discussion of the facts by noting that:

> "It is ... important for the Court to appreciate that this incident occurred in the midst of an armed engagement between U.S. and Iranian forces, in the context of a long series of attacks on U.S. and other vessels in the [Persian] Gulf[30]."

While the Islamic Republic disputes the content of this statement, it is a clear admission of the relevance of the background facts. Indeed, the United States goes on to acknowledge that "[t]he incident of Iran Air Flight 655 cannot be separated from the events that preceded it[31]", and cites from the ICAO Report, which made the same conclusion.

2.25 The United States further contradicts itself by devoting an entire chapter of its Statement of Facts to a detailed survey of attacks on "neutral" shipping in the Persian Gulf throughout the period of the imposed war, and a review of U.S. military policy and actions in the Persian Gulf region prior to the incident.

2.26 Thus, there is no real argument over the relevance of the events prior to the shoot-down of Flight IR 655, and the Islamic Republic has not expanded its complaint by referring to such events. However, the United States has given a version of these events that is misleading and inaccurate, which the Islamic Republic will attempt to correct below, whilst at the same time explaining the relevance of these events to the claims made in its Application.

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[30] U.S. Preliminary Objections, p. 9.

[31] Ibid.

SECTION B. The Relevance of the Background Facts to the Shoot-down of Flight IR 655

(i) The non-neutral policy of the United States towards the Islamic Republic

2.27 The United States asserts that the major thrust of its policy in the war imposed by Iraq on the Islamic Republic was to seek a peaceful settlement of the conflict, in particular by the implementation of the Security Council's Resolution 598[32]. In fact, while the United States repeatedly and as late as 23 May 1988 professed its neutrality in the conflict on which the Islamic Republic relied, the United States actively supported Iraq and adopted a provocative and hostile attitude towards the Islamic Republic. This policy was a contributory factor to the shoot-down of Flight IR 655.

2.28 In his book Fighting for Peace, the U.S. Secretary of Defense at the time, Caspar Weinberger, while noting that "official policy was to remain neutral", stated that he "managed to have official United States statements and actions convey that we 'tilted' toward Iraq[33]". It has now become common knowledge, particularly in the aftermath of the war between Iraq and Kuwait, that this tilt was far more extreme than suggested by Mr. Weinberger. The following facts give a better appreciation of the true status of U.S. policy from 1980 to 1988:

- Diplomatic relations which had been broken since 1967 were reestablished with Iraq, one of the belligerents, in November 1984 and remained intact throughout the war, whereas the United States had no diplomatic relations with the Islamic Republic;

- Economic sanctions were imposed on all goods of Iranian origin and an almost total restriction on trade relations of any kind with the Islamic Republic from 1980 onwards. No such sanctions were imposed on Iraq. Indeed, trade with Iraq was substantially increased during this period to assist Iraq's ailing war economy;

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[32] U.S. Preliminary Objections, p. 14.

[33] Weinberger, C.W.: Fighting for Peace, Warner Books, 1990, p. 358. See, Exhibit 8 to the Memorial of the Islamic Republic.

- The United States put into effect "Operation Staunch" which was designed to prevent the Islamic Republic from receiving arms from almost anywhere in the world. This was combined with a near blockade of Iranian ports and coastlines together with comprehensive monitoring and surveillance of vessels going to and from such ports[34]. No such steps were taken against Iraq. In fact, the United States expressly authorized trade with Iraq to include equipment that could be used for military purposes[35];

- The United States' policy of reflagging Kuwaiti ships was directly aimed at assisting Iraq. As has become apparent since the Kuwait-Iraq war, Kuwait supported Iraq in its war effort, providing Iraq with massive financial support and other assistance[36];

- It has also been revealed in U.S. Congressional Hearings held this year that the United States was involved in an extensive agreement whereby military intelligence was provided to Iraq throughout the war. As stated in those records, this program began in 1984, out of fear that Iraq might lose the war, and was extended in 1986[37]. The aim of this arrangement was expressly to provide "intelligence and advice with respect to the pursuit of the war"[38];

- The same Congressional Records suggest that massive U.S. Government supported loans of billions of dollars were

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[34] Ibid., pp. 421-424.

[35] See, Boyle, F.A.: "International Crisis and Neutrality: U.S. Foreign Policy toward the Iraq-Iran War", in Neutrality - Changing Concepts and Practices, ed. Leonhard, A.T., University Press of America, 1988. Exhibit 8. This article contains a detailed review of non-neutral actions by the United States during the war. See, also, The Washington Post, 16 September 1990 for a review of the United States' policy toward Iraq. Exhibit 9.

[36] See, Chubin, S. & Tripp, C.: Iran and Iraq at War, London, 1988, p. 154. Exhibit 10.

[37] Congressional Record-House of Representatives (March 9, 1992), H 1109. Exhibit 11.

[38] Ibid.

> made to Iraq during the war and used for military purchases[39].

2.29 These actions violated the laws of neutrality and show that the United States failed to abide by Security Council Resolution 598, which in paragraph 5 called on "all other States to exercise the utmost restraint and to refrain from any act which may lead to further escalation and widening of the conflict, and thus to facilitate the implementation of the present resolution[40]". This policy was particularly unacceptable given the fact, well-known at the time, that Iraq had imposed the war on the Islamic Republic by its invasion in 1980.

2.30 Iraq's responsibility for the conflict has now been confirmed by the Secretary-General of the United Nations. It will be recalled that under paragraph 6 of Resolution 598 (1987), the Secretary-General was requested by the Security Council -

> "... to explore, in consultation with Iran and Iraq, the question of entrusting an impartial body with inquiring into responsibility for the conflict and to report to the Security Council as soon as possible[41]".

2.31 As a result of investigations carried out in implementation of Resolution 598, the Secretary-General issued his Report on 9 December 1991 which concluded that -

> "... the war between Iran and Iraq, which was going to be waged for so many years, was started in contravention of international law,

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[39] Ibid., H 1110.

[40] Resolution 598 (1987), United Nations Security Council (2750th Meeting, 20 July 1987), U.N. Doc. S/RES/598 (1987). Exhibit 12.

[41] Ibid.

> and violations of international law give rise to responsibility for the conflict[42]".

In this connection, the Report found that the specific concern of the international community was "the illegal use of force and the disregard for the territorial integrity of a Member State[43]". The Report stated that the outstanding event under these violations was -

> "... the attack of 22 September 1980 against Iran, which cannot be justified under the Charter of the United Nations, any recognized rules and principles of international law or any principles of international morality and entails the responsibility for the conflict[44]."

The Report added that Iraq's aggression against Iran was "in violation of the prohibition of the use of force, which is regarded as one of the rules of jus cogens[45]".

2.32 Notwithstanding Iraq's responsibility for starting the Iran-Iraq war, the United States continues to protest that its actions in the Persian Gulf were entirely justified. Thus, in Annex 1 to its Preliminary Objections it states:

> "As a result of the United States' efforts to protect its vessels in the [Persian] Gulf, Iran repeatedly charged (as it does in its Memorial) that the United States was not a neutral in the Iran-Iraq war. The United States certainly worked to bring the war to a negotiated end, leaving neither victor nor vanquished, but any concerted U.S. pressure on Iran reflected Iran's intransigence to negotiate with

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[42] Further Report of the Secretary-General on the Implementation of Security Council Resolution 598 (1987), 9 December 1991, U.N. Doc. S/23273. Exhibit 4, para. 5.

[43] Ibid.

[44] Ibid., para. 6.

[45] Ibid., para. 7.

> Iraq despite Security Council Resolution 598, and not an attempt by the United States to intervene in the war on behalf of Iraq[46]."

In the light of the facts recounted in paragraph 2.28 above, this statement can be seen to be totally inaccurate. It was not the United States' business to pressure one side or the other or interfere under Resolution 598. Indeed, paragraph 5 of the Resolution called upon all other States to "exercise the utmost restraint". Despite this admonition, the United States still took sides with Iraq. As Lawrence Korb, the Former Assistant Secretary of Defense, stated in an interview on CNN on 2 July 1992 -

> "... when the United States went into the [Persian] Gulf it was not simply just to escort Kuwaiti tankers. We wanted to ensure that Iran did not win that war. In other words, we became de facto allies of Iraq[47]."

2.33 In drawing attention to these issues, the Islamic Republic is not, as the United States alleges, seeking to expand its complaint or to submit new disputes concerning violation of the laws of neutrality to the Court[48]. The sole purpose of this presentation is to show that, despite its repeated professions of neutrality, the United States in fact adopted a hostile and provocative attitude towards the Islamic Republic. This forms part of the explanation of the shoot-down of Flight IR 655 and the continued application of the illegal U.S. NOTAMs in the Persian Gulf.

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[46] U.S. Preliminary Objections, Annex 1, pp. 17-18 (footnotes omitted).

[47] See, the interviews with William Colby, Former Director of the CIA, and Lawrence Korb, Former Assistant Secretary of Defense, on Larry King Live, 2 July 1992. The transcript of this programme is included in Exhibit 13. See, in particular, pp. 10, et seq.

[48] U.S. Preliminary Objections, pp. 84-85.

(ii) The role of U.S. military forces in the Persian Gulf

2.34 The United States seeks to justify the presence of its military forces in the Persian Gulf by reference to the need to protect neutral shipping and the need to keep open the Strait of Hormuz[49]. It provides a separate Annex and numerous references to press reports of alleged attacks on neutral shipping to support this contention. These facts have no relevance to the jurisdictional issues in the case, and seem designed only to color the Court's appreciation of the case.

2.35 These facts are also of limited relevance to the merits of the case. The Islamic Republic's actions with respect to commercial traffic during the war with Iraq were entirely directed at preventing contraband being passed to Iraq, which is a right of any belligerent State. This right was recognized by the U.S. Government at the time as well as by other third States, in particular the United Kingdom. The Islamic Republic had no quarrel with U.S. forces per se and never initiated any attack against U.S. military forces in the Persian Gulf. Indeed, it has been confirmed both by U.S. Government and military officials that the Islamic Republic always acted in a restrained and professional manner in dealings with U.S. forces[50]. In such circumstances, claims that Iranian actions were directed against commercial traffic can provide no justification for the Vincennes treating Iranian aircraft, military or otherwise, as hostile.

2.36 Most important of all, it has now become clear from evidence recently come to light that on the day of the incident there was no "harassment" of merchant vessels of any kind by Iranian forces which might have explained the involvement of U.S. forces. While this point will be discussed further below[51], it shows that the United States' presentation of facts concerning alleged attacks on neutral shipping cannot help to excuse the Vincennes' actions.

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[49] See, U.S. Preliminary Objections, pp. 15, et seq., and Annex 1 thereto.

[50] See, paras. 2.46-2.47 below.

2.37 Nevertheless, to correct the impression which the United States seeks to give by its lengthy presentation on this issue, it is necessary to draw attention to facts which the United States fails to mention:

> First: just as Iraq had started the war and was thus responsible for it, Iraq also started the attacks on shipping in the Persian Gulf in 1980, attacks which continued and increased in intensity for 4 years without any response from the Islamic Republic[52];
>
> Second: Iraq was primarily responsible for such attacks[53];
>
> Third: disruption of shipping in the Persian Gulf was contrary to the Islamic Republic's interests because the large part of its trade was conducted through the shipping lanes and ports of the Persian Gulf;
>
> Fourth: Iranian commercial shipping was one of the heaviest sufferers from such attacks[54];
>
> Fifth: the Islamic Republic's actions were aimed at identifying and, in case of doubt, stopping and searching vessels considered to be carrying contraband of war, which is the recognized right of any belligerent State. Moreover, as was well-known at the time, other Persian Gulf States supported Iraq directly or indirectly in its war efforts. Iraq has no usable port on the Persian Gulf and it was obvious that shipments of war materials through ports of other States could be destined for Iraq. For example, it was also well-known that both Kuwait and Saudi Arabia had not only made extensive loans to Iraq but had also opened up their ports for the shipment of goods bound for Iraq[55];

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[51] See, paras. 2.68-2.71 below.

[52] See, for example, The Washington Post, 13 October 1987, which is included in Exhibit 35 to the U.S. Preliminary Objections.

[53] Ibid.

[54] Ibid.

[55] Chubin, S. & Tripp, C., supra, p. 154. Exhibit 10.

Sixth: the Iranian Navy had made clear in a series of Notices to Mariners issued as early as 1980 the steps it was being forced to take as a result of Iraqi aggression. The Navy called on States using the Persian Gulf shipping lanes to follow prescribed safety routes outside the war zone in the northern part of the Persian Gulf, where they could become involved in hostilities, and not to set anchor in the Shatt 'al Arab. Vessels could only come into this war zone if destined for Iranian ports. It also called on neighbouring States with ports on the Persian Gulf not to give assistance to Iraqi vessels, or to vessels carrying consignments of arms to Iraq. In so doing, the Islamic Republic informed such States of its right as a belligerent to enforce such rules[56].

2.38 For the same reasons, and contrary to the United States' allegations, the Islamic Republic was committed to keeping open the Strait of Hormuz, on which it depended for a substantial amount of its trade. The Notices to Mariners referred to above did not cover the Strait of Hormuz and the Islamic Republic made clear its commitment to keep the Strait open in a letter to the Secretary-General of the United Nations[57].

2.39 The United States acknowledges that Iraq initiated the so-called "tanker war" by "attacks on tankers using Iran's oil terminal at Kharg Island"[58]. The United States has also recognized that belligerents have a traditional right "to prevent war supplies from being shipped to an enemy"[59]. For example, when on 12 January 1986, a U.S. vessel, the President Taylor, was boarded and searched by Iranian officials, the Department of State admitted that "There is a basis in international law for ship searches by belligerents[60].

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[56] Copies of the Notices to Mariners issued by the Islamic Republic. Exhibit 14.

[57] Letter dated 21 October 1980 from the Chargé d'Affaires of the Permanent Mission of Iran to the United Nations to the U.N. Secretary-General. U.N. Doc. S/14226, 22 October 1980. Exhibit 15.

[58] U.S. Preliminary Objections, p. 13.

[59] See, New York Times, 13 January 1986. Exhibit 9 to the Memorial of the Islamic Republic.

2.40 In such circumstances, the United States had an obligation to remain neutral and to restrict its role to the protection of neutral shipping. In fact, it did no such thing. The U.S. forces repeatedly violated the territorial sovereignty of the Islamic Republic and repeatedly interfered with Iranian civil and military traffic[61]. In reflagging Kuwaiti ships when Kuwait was a de facto ally of Iraq, the United States was also directly helping Iraq in its war efforts[62]. The United States was engaged in a form of "gunboat diplomacy" thousands of miles from its own shores, aimed at pressurizing the Islamic Republic and provoking an incident that would further the United States' interests in the war[63].

2.41 These actions were part of what then Vice-President Bush described as attempts by the United States to find means "to bolster Iraq's ability and resolve to withstand Iranian attacks[64]. Despite the fact that Iraq had imposed the war on the Islamic Republic and was largely responsible for all attacks on shipping (making no attempt to abide by the rules of visit and search governing belligerents), the United States exercised no similar pressure on Iraq.

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[60] Department of State Bulletin (March 1986), No. 2108, p. 41. Exhibit 9 to the Memorial of the Islamic Republic.

[61] This is clearly evidenced in the Islamic Republic's repeated protests to the U.N. Secretary-General for distribution as Security Council documents. Exhibit 16. See, also, its protests to the United States through the Islamic Republic's Interests Section at the Embassy of the Democratic and Popular Republic of Algeria. Exhibits 19 and 21 to the Memorial of the Islamic Republic.

[62] See, Chubin, S. & Tripp, C., supra, p. 154. Exhibit 10.

[63] See, Exhibit 17.

[64] Congressional Record-House of Representatives (March 2, 1992), H 860. Exhibit 11.

Even today, from the United States' Preliminary Objections, one would not know that Iraq had played any role at all in the hostilities.

2.42 As one historian has noted in reviewing the role of the U.S. forces in the Persian Gulf -

> "Iran's activity in the [Persian] Gulf before the U.S. entry was almost entirely in retaliation for Iraqi attacks on tankers bound for Iran; the Iranians are the party most interested in keeping the [Persian] Gulf open to tankers. It has been Iraq, not Iran, that over the years has attacked and disrupted by far the most shipping, for the simple reason that Iran depends completely on the [Persian] Gulf and the Strait of Hormuz to export all its oil, while Iraq sends its oil abroad by pipeline. The United States could do far more to pacify the [Persian] Gulf, if that is what it really wants to do, by persuading Iraq to stop its attacks on Iranian shipping, which are what started and perpetuate the naval war in the [Persian] Gulf[55]."

This statement represents a far truer picture of the role of the U.S. forces in the Persian Gulf at the time and substantially confirms the Islamic Republic's presentation of the facts. The Former Assistant Secretary of Defense, Lawrence Korb, explained U.S. policy as follows:

> "The great irony was [that] Iraq was destroying many more ships trying to get out of the [Persian] Gulf than Iran was at that time. But when we went in, we wanted to ensure that Iran didn't win that war from Iraq. That was our real objective, and so we were doing a lot of things to ensure that we could teach the Iranians a lesson[56]."

(iii) Iranian forces acted in a non-aggressive manner towards U.S. forces

2.43 In an effort to show that U.S. forces were justified in treating the Islamic Republic as hostile, the United States refers to a number of alleged engagements between U.S. and Iranian military forces in the period prior to the shoot-down[67]. Again, it must be noted that these "facts" relate solely to the merits of the case and can have no relevance to the United States' jurisdictional objections. Moreover, there is a certain unreality in the United States' argument that the modest Iranian naval and air forces would engage the most powerful fleet in the world. The Islamic Republic's forces were fully engaged in the war imposed by Iraq and the idea that they would have risked bringing the United States into the war by a direct attack on the U.S. Navy defies belief.

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[55] Keddie, N.R.: "Iranian Imbroglios: Who's Irrational?", World Policy Journal, Winter 1987-1988, p. 46. Exhibit 18.

[56] Exhibit 13, pp. 11-12.

2.44 The Islamic Republic never initiated any attack against U.S. military forces or U.S. flagged vessels. Among the numerous press reports filed by the United States, only one refers to an alleged attack by Iranian forces on U.S. military forces. This concerns what was said to be an attack by small Iranian boats on a U.S. helicopter on 8 October 1987. However, the Islamic Republic immediately denied that the boats had attacked the helicopter and the United States itself concedes that the outcome of the "incident" was the sinking of three Iranian boats and loss of life, while U.S. forces suffered no damage at all[68].

2.45 The only other incident in which U.S. and Iranian forces were directly involved arose from the U.S. attack on Iranian forces on 18 April 1988, which the United States sought to justify as an armed reprisal for damage to a U.S. vessel that had hit a mine in the Persian Gulf a number of days before[69]. Notwithstanding that such reprisals are illegal under international law, according to Mr. Weinberger, the U.S. destroyed half of the Islamic Republic's naval forces in this attack[70]. It is significant that this attack coincided exactly with one of the major Iraqi offensives of the war in which Iraq took the Fao peninsula. This was one of the worst blows to the Islamic Republic's effort to make Iraq abide by the 1975 Frontier Treaty and withdraw from the considerable parts of Iranian territory that it had unlawfully occupied[71]. Despite this attack, the United States was at pains to stress that this was an isolated incident, that it did not seek confrontation with the Islamic Republic and that it remained neutral[72].

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[67] U.S. Preliminary Objections, pp. 16, et seq.

[68] Ibid., pp. 17-18.

2.46 The best reply to the contentions that the Islamic Republic threatened U.S. forces was given by the former U.S. Secretary of Defense, Caspar Weinberger, who stated that Iranian forces had demonstrated "a decided intent to avoid American warships[73]". This description is confirmed by the Commander of the USS Sides, Commander Carlson, who was present in the area on 3 July 1988 and perhaps best able to judge the so-called "threat" from Iranian forces. In a remarkably candid assessment, he stated that these forces were "pointedly non-threatening" in the month preceding the destruction of Flight IR 655 and that they were "direct and professional in their communications", consistently heeding and taking steps to avoid U.S. forces[74].

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[69] The United States makes much of the Islamic Republic's alleged mining of the Persian Gulf. See, inter alia, U.S. Preliminary Objections, pp. 18-19. However, the sole evidence it points to in this regard is a statement by an Iranian official reported in The Washington Post that the Islamic Republic had mined certain areas "to protect Iranian coastal installations". The official also pointed out that use of these mines was designed for defence not "to block freedom of navigation". The Washington Post, 21 August 1987, U.S. Preliminary Objections, Exhibit 35. See, also, the letter from the Minister of Foreign Affairs of the Islamic Republic to the U.N. Secretary-General dated 26 September 1987. U.N. Doc. S/19161, 29 September 1987 included in Exhibit 16.

[70] See, Weinberger, supra, p. 425. Exhibit 8 to the Memorial of the Islamic Republic.

[71] Ibid. See, also, ABC Nightline transcript, p. 6, on the timing of this incident. Exhibit 6.

[72] See, the letter dated 18 April 1988 from the Acting Permanent Representative of the United States to the United Nations to the President of the Security Council. U.N. Doc. S/19791, 18 April 1988. Exhibit 19.

[73] Weinberger, supra, p. 401. Exhibit 8 to the Memorial of the Islamic Republic.

2.47 It should be remembered that the Islamic Republic was engaged in a full-fledged armed conflict with Iraq and had been subjected to hundreds of attacks by Iraqi forces in the Persian Gulf. It was also subjected to almost daily violations of its territorial sovereignty and interference in its civil and military aviation by the United States[75]. Despite this situation, on every occasion Iranian aircraft and vessels made it a policy to keep clear of U.S. forces. No hostile intent was shown, and no attack was ever made on a U.S. warship. As the U.S. Assistant Secretary of Defense stated in May 1987, "Iran has been careful to avoid confrontations with U.S. flag vessels[76]".

(iv) U.S. forces showed an aggressive and hostile attitude

2.48 Notwithstanding the "non-threatening" and "professional" conduct of Iranian forces, the Defense Department Report attached to the ICAO Report states that planes and boats originating from the Islamic Republic were automatically assumed to be hostile by U.S. forces[77]. This attitude was reflected in the United States' rules of engagement and its NOTAMs and was the direct result of the bias characterizing U.S. Government policy in the region.

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[74] See, Carlson's statement in Proceedings, September 1989, at p. 87. Exhibit 23 to the Memorial of the Islamic Republic.

[75] Exhibit 16 contains the protests made by the Islamic Republic to the U.N. Secretary-General concerning these violations. It can be seen from these protests that there were hundreds of illegal warnings given to Iranian aircraft, that aircraft were intercepted for as long as 1 hour at a time, and that U.S. forces repeatedly intruded into Iranian airspace and Iranian territorial waters.

[76] U.S. Department of State Bulletin, July 1987, p. 60. Exhibit 29 to the Memorial of the Islamic Republic.

2.49 The posting of the Vincennes to the Persian Gulf was a key part of the U.S. strategy. The Vincennes, as well as the presence of the U.S. fleet as a whole, constituted a pre-planned show of force specifically intended to intimidate the Islamic Republic. Despite being confronted with this kind of provocation, the Islamic Republic exercised a considerable measure of restraint. By way of contrast, it can readily be imagined that the United States would have regarded it a serious threat to national security if a foreign State amassed its forces just off the coast of the United States and acted in a similarly provocative manner.

2.50 The hostile attitude of the Vincennes was confirmed by the Commander of the the Sides - the Vincennes' companion ship. He attested that the Vincennes' actions "appeared to be consistently aggressive", that "an atmosphere of restraint was not her long suit", and that her crew "hankered for an opportunity to show their stuff[78]. In other words, on 3 July 1988 the Vincennes was not only predisposed as a result of the U.S. rules of engagement to treat any aircraft taking off from the Islamic Republic as hostile, but was looking for an excuse to use its weapons. As Lawrence Korb, the Former Assistant Secretary of

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[77] The Defense Department Report (p. E-52 (emphasis added)) is telling in this regard. It stated that as long as hostilities continued in the area, "Commercial air, particularly commercial air from Iran, is at risk ...". Exhibit 4 to the Memorial of the Islamic Republic. Thus, Flight IR 655 was immediately identified as an "unknown-assumed enemy" by the USS Vincennes. U.S. Preliminary Objections, p. 30, fn. 1.

[78] See, Carlson, Proceedings, September 1989, at p. 88. Exhibit 23 to the Memorial of the Islamic Republic. These descriptions are vividly confirmed in the ABC Nightline and Newsweek reports attached as Exhibits 6 and 3.

Defense, has indicated, the United States was "doing a lot of things to ensure that we could teach the Iranians a lesson[79]".

2.51 The Islamic Republic submits that the events in the Persian Gulf prior to the shoot-down show that U.S. military forces treated Iranian forces as hostile but had no justification for doing so. Such a conclusion is obviously relevant to what happened on 3 July 1988, because the Vincennes assumed Flight IR 655 to be hostile, wholly without reason. The introduction of such facts cannot therefore be regarded as an expansion of the Islamic Republic's complaint to the Court.

SECTION C. The Relevance of the Background Facts Concerning the NOTAMs and the Issue of Civil/Military Coordination

2.52 In its Memorial, the Islamic Republic showed that U.S. forces had repeatedly interfered with or threatened Iranian commercial traffic in the Persian Gulf region in the period prior to the incident[80]. These facts directly related to the contention made in the Islamic Republic's Application that the United States violated Annex 15 of the Chicago Convention and Recommendation 2.6/1 of the Third Middle East Regional Air Navigation (MIDRAN) meeting[81]. In particular, the United States' issuance of illegal NOTAMs and the failure of its forces to coordinate with civilian ATS authorities in the region caused interferences in civil aviation and constituted violations of the Chicago Convention. Given that these actions were referred to in the Islamic Republic's Application, there can be no merit in the United States' argument that the Islamic Republic has expanded its original complaint by introducing background facts relating to such violations. In any event, as shown above, these actions are also relevant to an understanding of the shoot-down itself.

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[79] Exhibit 13, p. 12.

[80] See, Memorial of the Islamic Republic, pp. 33-42.

[81] See, Application of the Islamic Republic, p. 8.

2.53 The provisions enshrined in Annex 15 of the Chicago Convention and in the Recommendation of the Third MIDRAN Meeting were designed to give effect to certain fundamental principles set out in the body of the Chicago Convention, in particular those principles found in the Preamble and Articles 1, 2, 3 bis, and 44(a) and (h) of the Convention on which the Islamic Republic specifically relied in its Application.

2.54 The United States deployed its forces in the Persian Gulf ignoring such fundamental principles. In particular, the United States failed to take steps to coordinate its military activities with civilian ATS authorities in the region and promulgated illegal NOTAMs[82]. There is no doubt as to the factual basis of the Islamic Republic's contentions. The ICAO Report found that:

> "There was no coordination between United States warships and the civil ATS units responsible for the provision of air traffic services within the various flight information regions in the [Persian] Gulf area[83]."

With regard to the NOTAMs, the Report also found that -

> "... the promulgation of the NOTAM was not in conformity with the provisions of ICAO Annex 15[84]."

2.55 The United States' forces constantly interfered with Iranian civil aviation traffic and repeatedly violated the Islamic Republic's sovereignty over its own airspace. In so doing, they also created a grave safety risk. The Islamic Republic made repeated protests both to the Secretary-General of the United Nations, to ICAO and to the United States concerning these violations of international law, and the threat to the safety of civil aviation that they posed[85].

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[82] See, Memorial of the Islamic Republic, pp. 209-238.

[83] ICAO Report, para. 2.8.4. Exhibit 4 to the Memorial of the Islamic Republic.

[84] Ibid., para. 2.2.4.

2.56 The actions of the United States constituted violations not only of specific provisions of the Chicago Convention but also of the Treaty of Amity[86], which enshrines numerous principles intended to preserve freedom of commerce and navigation in any form and to avoid any unreasonable or discriminating measures which might impede such freedom of commerce and navigation (see, in particular, Articles IV, VIII and X). These actions were also violations of the principles of customary international law relating to the prohibition against the use of force, principles of good-neighbourliness, sovereignty and freedom of commerce enshrined in both treaties. There is thus no merit in the United States' argument that the Islamic Republic has sought to expand its complaint by making reference to various rules of customary international law regarding the use of force, sovereignty and freedom of

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[85] Protests to the Secretary-General are attached hereto as Exhibit 16. For the protests to ICAO and to the United States, see, Exhibit 15 and Exhibits 19 and 21 to the Memorial of the Islamic Republic, respectively.

[86] In this regard, there is no substance in the United States' argument that by introducing the Treaty of Amity in its Memorial the Islamic Republic has sought to transform the dispute submitted to the Court in its Application. The same disputes can be treated by the Court under both the Chicago Convention and the Treaty of Amity. The Treaty of Amity affords the Court an additional basis of jurisdiction for the same dispute. See, generally, Part VI, below.

:ommerce and navigation[87].

2.57 As will be shown below, the illegal NOTAMs and the lack of ivil/military coordination are also directly related to the shoot-down. If the nited States really did not know that Flight IR 655 was a commercial flight, this annot be used as an excuse because this ignorance resulted directly from the nited States' failure to coordinate its military activities with civilian ATS uthorities. Similarly, the alleged U.S. warnings to Flight IR 655 cannot be relied m because these warnings were made pursuant to the United States' illegal OTAMs, and were thus themselves totally illegal[88].

HAPTER II THE SHOOT-DOWN OF FLIGHT IR 655

2.58 The United States also sets out in detail its version of facts elating to the shoot-down itself. Its primary aim is again to present its defense on he merits - that it acted in self-defense and that the Islamic Republic shares part f the burden of responsibility - without even pretending that such facts have any elevance to its jurisdictional objections. As will be shown further below, the nited States' presentation of the facts remains misleading and inaccurate.

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[7] See, U.S. Preliminary Objections, pp. 84-85. With regard to the use of force, Article 3 bis of the Chicago Convention has not been ratified. However, it represents a fundamental principle of international law which is already enshrined in the Chicago Convention. See, the Memorial of the Islamic Republic, pp. 147-154. The United States was the strongest supporter of this Article and, given that it is already enshrined in the Convention, should be estopped from violating this principle even if not ratified. Significantly, the United States does not take issue with the status of Article 3 bis in its Preliminary Objections. Although Article 3 bis has not yet been ratified by the Islamic Republic, immediate steps were taken to initiate this procedure after its signature.

[8] In Annex 2 to its Statement of Facts, the United States seeks to justify the promulgation of its illegal NOTAMS, although again this is in no way a factual issue related to its jurisdictional objections. The United States once again presents a defense on the merits while seeking by filing preliminary objections to prevent the Islamic Republic from having the opportunity to present its rebuttal. Taking this into consideration, the Islamic Republic has chosen to restrict its reply to the U.S. presentation to an Annex hereto.

2.59 Section A will focus on the events immediately prior to the shoot-down. It will be shown that this was a particularly calm period in the Persian Gulf, that the United States had no reason to expect any hostilities and that the United States unjustifiably provoked hostilities on the morning of 3 July 1988, violating the Islamic Republic's territorial sovereignty. The flight of IR 655, and the alleged warnings given by the U.S. forces to the aircraft as well as their failure to identify it as a civilian flight will then be discussed in Section B.

SECTION A. Events Immediately Prior to the Shoot-down of Flight IR 655

(i) The week preceding the shoot-down

2.60 In the United States' Statement of Facts, it is alleged that during the three-day period prior to the incident there was heightened air and naval activity in the Persian Gulf, that the Islamic Republic had in the preceding month deployed F-14s to Bandar Abbas airport, and that U.S. forces in the Persian Gulf were alerted to "the probability of significant Iranian military activit against ... U.S. military vessels in retaliation for recent Iraqi military successes" over the Fourth of July holiday weekend[89]. The sole purpose of this discussion is to seek to show that there was a hostile atmosphere prior to the incident and to lend credence to the United States' self-defense argument. It is totally without relevance to the United States' jurisdictional objections.

2.61 The United States gives no evidence whatsoever to support its contentions that there was such a hostile atmosphere. Its arguments are simpl drawn from statements made in its one-sided and censored Defense Department Report. In fact, objective evidence shows that there was no heightened activity i the Persian Gulf prior to the incident. An article in The Washington Post on 3 July 1988, filed as an Exhibit by the United States, reports that prior to 3 July ıere had been "a nearly three-week lull in the [Persian] gulf's 'tanker war'", roken only by an *Iraqi* attack on two *Iranian* tankers on 2 July 1988[90].

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[89] U.S. Preliminary Objections, p. 22.

2.62 Speaking on 2 July 1988, one day before the incident, ieutenant General George B. Crist, the head of the U.S. Central Command, onfirmed this, stating that "Iran's naval vessels and gunboats of its Revolutionary iuard have avoided U.S. ships since U.S. military forces destroyed or sank six anian vessels [on] April 18[91]".

2.63 The United States also gives no evidence as to the alleged icreased activities of F-14s at Bandar Abbas airport in the three days prior to the ioot-down, an allegation which the Islamic Republic categorically denies. In ict, Iranian F-14s were used for scheduled reconnaissance trips in an area distant om where the incident itself occurred, their activity had considerably decreased i the period prior to the incident and no F-14s were in operation on 3 July 1988.

2.64 In any event, the alleged deployment of F-14s can be of no gnificance. As was explained in the Islamic Republic's Memorial, these aircraft re designed for air-to-air combat, not attacks on surface vessels, and in fact had ever been so used[92]. The United States was well aware that the Islamic epublic had no capability to attack U.S. warships. The U.S. Assistant Secretary f Defense stated in May 1987 that "Iran lacks the sophisticated aircraft and eaponry used by Iraq in the mistaken attack on the *U.S.S. Stark*[93]". The United

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[0] *Ibid.*, *Exhibit 35*. *The Washington Post*, 3 July 1988.

[1] *The Washington Post*, 2 July 1988. *Exhibit 20*.

[2] Memorial of the Islamic Republic, pp. 73, *et seq*.

[3] *Department of State Bulletin*, July 1987, p. 60. *Exhibit 29* to the Memorial of the Islamic Republic.

States also recognized that the Iranian air force had been direct and professional in its communications and non-threatening.

2.65 Finally, why the United States should have expected an attack on 4 July in response to Iraqi successes in the war is left unexplained. The Islamic Republic was at war with Iraq not the United States. Despite the infliction of heavy damages by Iraq on several previous occasions, this had never resulted in attacks by the Islamic Republic on U.S. forces, even though, as has subsequently been confirmed, the United States was assisting Iraq. Indeed, as explained above, Iranian forces never initiated any attack on U.S. military forces and had always taken steps to avoid such confrontations.

2.66 The only specific incident to which the United States can point during this period involved a Danish vessel, the Karama Maersk, on 2 July 1988[94]. This incident involved a routine search by Iranian small patrol boats of a vessel carrying goods from Saudi Arabia, a nation supporting Iraq in its war effort[95]. This action was fully within the rights of the Islamic Republic as a belligerent, and vessels trading in the Persian Gulf were aware of the Islamic Republic's exercise of these rights[96]. The Karama Maersk suffered no harm and the small patrol boats retired immediately after a U.S. warship, the Elmer Montgomery, approached[97]. These facts hardly portray a threatening or dangerous attitude by the Iranian forces towards U.S. forces in the period prior to the incident.

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[94] U.S. Preliminary Objections, pp. 22-23.

[95] See, Chubin, S. & Tripp, C., supra, p. 154. Exhibit 10.

[96] See, the Notices to Mariners in Exhibit 14.

[97] U.S. Preliminary Objections, Exhibit 35. The Washington Post, 3 July 1988.

(ii) The morning of 3 July 1988

2.67 The events of 3 July 1988 are vividly portrayed in the Newsweek and ABC Nightline reports filed as Exhibits 3 and 6, and to which the Court is urged to give due attention. The Islamic Republic will not refer to every statement made in these reports which contradicts the United States' pleading, but it will be obvious that they paint a very different picture of what happened to that given by the United States. The Court is also directed to the statement of the Minister of Foreign Affairs of the Islamic Republic of Iran, Dr. Velayati, made before the U.N. Security Council on 14 July 1988. It will be apparent from this statement that Dr. Velayati's presentation of the facts with regard to what happened on 3 July 1988 was accurate and has now been substantially confirmed by the recent disclosures in the United States[98].

2.68 The United States claims that early on the morning of 3 July 1988 there was hostile Iranian gunboat activity in the northern portion of the Strait of Hormuz outside the territorial waters of the Islamic Republic, and that it was noted that these boats were approaching a Pakistani vessel[99]. No evidence is given for this statement, either as to the position of the Iranian boats or as to their confrontation of the Pakistani vessel. In fact there was no such hostile gunboat activity and no confrontation of the Pakistani vessel, a fact confirmed by other U.S. government sources.

2.69 The United States has told so many different versions of what happened thereafter that it is difficult to accept any as accurate. Vice-President Bush told the U.N. Security Council that the Vincennes went to the assistance of a neutral vessel that was under attack by Iranian small patrol helicopter and confirm that it was within territory under the Islamic Republic's sovereignty in contravention of Article 2 of the Chicago Convention[109].

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[98] Exhibit 21 contains the full text of Dr. Velayati's statement.

[99] U.S. Preliminary Objections, pp. 24-25.

2.73 In any event, the helicopter was also within the Islamic Republic's Flight Information Region and under the Islamic Republic's jurisdiction. Military aircraft have no right under the Chicago Convention to enter another State's FIR without prior notification and proper coordination with the relevant civilian authorities. Of course, the United States made no attempt to abide by any of these rules.

2.74 The United States has presented no evidence for the allegation that the helicopter Ocean Lord was fired upon by Iranian boats. The pilot simply alleged that he saw "puffs of smoke"[110]. It should be noted, however, that these kinds of boats have no effective means of attack against a helicopter, although they would have been fully justified in firing warning shots against a foreign military aircraft unlawfully intruding into the Islamic Republic's airspace, and, as past experience had shown, causing a direct threat to the small boats. U.S. helicopters had previously sunk three small Iranian boats on 8 October 1987[111]. What really happened, as Commander Carlson has noted, was that the helicopter was "just too damned close to the boats for its own good", and that the helicopter was "not hit"[112]. Despite this situation, the U.S. warships then obtained permission to close on and engage the small boats considerably later, when the boats had retired in the direction of the shore.

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[109] ABC Nightline transcript, p. 4. Exhibit 6. Newsweek, p. 16. Exhibit 3.

[110] Newsweek, p. 12. Exhibit 3. See, also, Defense Department Report, p. E-27, para. 2(h). Exhibit 4 to the Memorial of the Islamic Republic.

[111] See, para. 2.44 above.

[112] Carlson, Proceedings, September 1989, p. 92. Exhibit 23 to the Memorial of the Islamic Republic.

2.75 In its Preliminary Objections, the United States alleges that, although its warships had not previously entered Iranian territorial waters, during the course of the attack on the small boats these forces were compelled as a matter of self-defense "to maneuver into waters claimed by Iran as territorial waters[113]". Quite incredibly, given its argument that the Treaty of Amity is not applicable to this dispute, the United States seeks to justify this action by reference to Article X, paragraphs 5 and 6, of the Treaty of Amity, pursuant to which the United States alleges that "a U.S. warship in distress is permitted to enter territorial waters claimed by Iran[114]".

2.76 The ICAO Report indicates that it was at least some thirty minutes after the alleged firing on the helicopter that the U.S. warships opened fire on the Iranian small boats, although the Islamic Republic believes that it was in fact after about an hour. By this time, the U.S. vessels were already well within the Islamic Republic's territorial waters. Moreover, the United States acknowledges that at 0643 it was the U.S. warships who opened fire on the Iranian boats[115]. This gap in time completely undermines the United States' assertion that the attack on the small boats was an act of self-defense.

2.77 The United States has consistently sought to conceal the evidence concerning the true positions of its warships during this incident. The Defense Department Report was recently reviewed in the U.S. press, where it was recognized that the "heavily censored public version of the investigation does not show the position and course of the Vincennes, the Iranian gunboats and the

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[113] U.S. Preliminary Objections, p. 27. The United States has never questioned in any way the Islamic Republic's right to its territorial sea.

[114] Ibid., fn. 3.

[115] U.S. Preliminary Objections, p. 27.

Commander Carlson pointed out, it is totally implausible that small patrol boats would dare to attack or could pose any serious threat to a vessel of the Vincennes sophistication and power[123]. In any event, the U.S. forces were at best reckless in seeking to engage the Iranian forces and violating the Islamic Republic's sovereignty without any justification. The United States cannot therefore excuse the resulting shoot-down on the basis of self-defense when as a result of its own illegal actions its forces had manoeuvered into a position within Iranian territorial waters that they considered dangerous.

SECTION B. The Flight of IR 655 and the Alleged Warnings Given by the U.S. Vessels

2.82 As was explained in the Islamic Republic's Memorial, Flight IR 655 was on a regularly scheduled flight with an experienced crew and was flying in the centre of the international air corridor over the Persian Gulf when it was shot down. It was also crossing the Persian Gulf well within its flight schedule[124].

2.83 The United States makes much of the fact that it could not have known that Flight IR 655 was a civilian flight and that it warned the aircraft of its intentions on several occasions. Although the Islamic Republic in no way endorses the factual presentation made by the United States, it is only necessary at this stage to make certain general points in response to these contentions. A more detailed treatment of the facts is more appropriately left to subsequent proceedings.

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[123] Proceedings, September 1979, p. 92. Exhibit 23 to the Memorial of the Islamic Republic.

[124] See, Memorial of the Islamic Republic, pp. 10, et seq.

2.84 It is only partly a question of whether the United States knew or did not know that Flight IR 655 was a civilian flight. Even if IR 655 had been a military plane, the United States still had no reason to shoot it down. It is totally unreasonable to assume that any military plane flying within its own airspace is hostile, especially when Iranian military planes had never previously attacked U.S. forces. Moreover, the fact that it was thought to be an F-14 should have alerted the Vincennes to the fact that it was unlikely to be making an attack. As was shown in detail in the Islamic Republic's Memorial, the theory that an F-14 could attack a U.S. warship is totally implausible[125].

2.85 It was well-known by the U.S. military that an F-14 was incapable of launching an attack on the Vincennes and that the Islamic Republic had no forces capable of such an attack. As was pointed out in Aviation Week & Space Technology "F-14A fighters sold to Iran by the U.S. were equipped to carry air-to-air missiles and have limited surface attack capabilities"[126]. Referring to the "hostile F-14" scenario adopted by the U.S. Government, and pleading to "spare us more fog", Commander Carlson asked why an F-14 would bother to energize its IFF system to squawk Mode II (a military signal) if it was trying to disguise its presence for a sneak attack. He also pointed out that one of the reasons why the Sides had classified Flight IR 655 as a non-threat was because of the "lack of any significant known F-14 antisurface warfare (ASUW) capability"[127]. The Defense Department's conclusion of May 1987 confirms the absurdity of this hypothesis, noting that -

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[125] Ibid., pp. 69, et seq.

[126] Aviation Week & Space Technology, 11 July 1988, p. 16. Exhibit 16 to the Memorial of the Islamic Republic.

[127] See, Carlson, Proceedings, September 1989. Exhibit 23 to the Memorial of the Islamic Republic.

represented unreasonable and discriminating measures impeding freedom of commerce and navigation under the Treaty of Amity. The ICAO Report noted explicitly that the U.S. NOTAMs, pursuant to which the challenges were made, were "not in conformity with the provisions of ICAO Annex 15[132]". It went on to note that the NOTAMS were not only illegal but also unclear, and it concluded that the safety risks to civil aviation caused by the presence of the U.S. forces in the Persian Gulf may have been "underestimated[133]".

2.91 The ICAO Report found that as a result of these failures to abide by the Chicago Convention the "presence and activities of naval forces in the [Persian] Gulf area have caused numerous problems to international civil aviation[134]". In particular, it stated that -

> "Civil aviation requirements such as airways, standard approach and departure procedures, and the fixed tracks used by helicopters to oil rigs were not a consideration in warship positioning. This resulted in warships challenging civil aircraft often in critical phases of flight, i.e. during approach to land and during initial climb[135]."

The resulting challenges, according to the ICAO Report, caused "additional confusion and danger[136]".

2.92 The ICAO Report also found that out of the eleven challenges supposedly made by the U.S. vessels only one identified Flight IR 655 with sufficient clarity for the pilot, if he had heard the challenge, to realize that his plane was being addressed[137]. This challenge was made 39 seconds before the plane was destroyed. During 11 of these vital seconds, the pilot was in routine communications with the Bandar Abbas tower. Thus, the pilot had no chance to respond, even if he had heard the challenge. Even the U.S. Defense Department Report notes that "Current verbal warnings and challenges used by JTFME [Joint Task Force Middle East] units are ambiguous because they do not clearly identify to pilots exactly which aircraft the ship is attempting to contact[138]." Moreover, it appears that none of the challenges allegedly made by U.S. forces complied with the requirements of its own NOTAM[139].

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[132] Ibid., para. 2.2.4.

[133] Ibid., para. 2.2.5.

[134] Ibid., para. 2.3.1.

[135] Ibid., para. 2.3.2.

[136] Ibid.

2.93 The United States' allegation that the Vincennes was subject to an imminent attack has thus been shown to be without foundation. The Vincennes had all the information available to know that Flight IR 655 was a civilian aircraft. It had no reason to fear an attack even if it had misidentified Flight IR 655 as an F-14. Finally, it had no reason to believe it was subject to a coordinated attack as the U.S. forces had themselves initiated the attack on the small patrol boats.

2.94 In such circumstances, it is totally unacceptable for the United States to call into question the professionalism of Iran Air and its pilots

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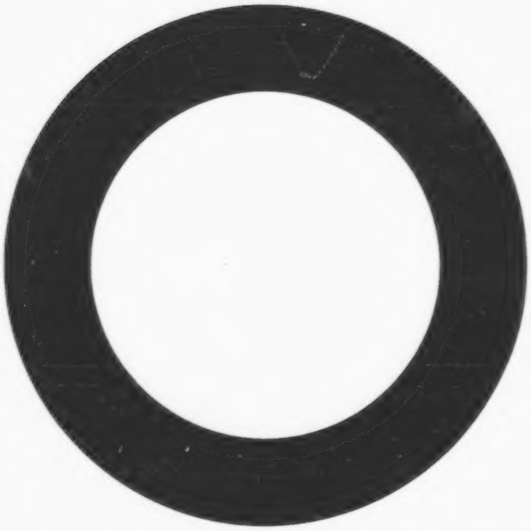
[137] Ibid., para. 2.10.18.

[138] Defense Department Report, p. E-53, para. 5; see, also, p. E-18, para. 18. Exhibit 4 to the Memorial of the Islamic Republic.

[139] Under the NOTAM that had been issued by the United States, aircraft approaching a U.S. warship were only supposed to be at risk of "defensive measures" if they had not been cleared from a regional airport and if they came within 5 nautical miles of a warship at an altitude of less than 2000 feet. In this case, the interception of IR 655 took place at a distance of 10 nautical miles from the Vincennes and at a height of 12,950 feet. Not only was this outside the lateral and vertical limits appearing in the NOTAM, but IR 655 was also a flight "cleared" to depart from a regional airport to which the NOTAM purported not to apply. For the text of the September 1987 NOTAM, see, Exhibit 14 to the Memorial of the Islamic Republic of Iran.



U.S. warships, because of the frequency of their presence, their neutral status and because it was not expected that they would attack Iranian civilian aircraft[147].

2.99 In any event, according to the United States, the Vincennes opened fire on the Iranian small patrol boats at 0643[148]. This was only 11 minutes before the shoot-down. In this same amount of time, the United States alleges it could not identify Flight IR 655 as a civilian flight when it was signalling its commercial flight Mode III code, was flying on schedule, and was communicating over open radio channels. How it expects that the Islamic Republic's military authorities could have become aware of the hostilities and of the fact that Flight IR 655 was flying in an area in which such hostilities were taking place, and that these authorities would have been able to warn Iranian civil aviation authorities who in turn would have been able to warn IR 655 in time is left totally unexplained.

2.100 Moreover, it now appears from the ABC and Newsweek reports that the United States had other means available to assess whether Flight IR 655 could have posed any possible threat. What the Defense Department Report failed to acknowledge is that there were two U.S. F-14s within 5 minutes flying time from the area and, as had happened many times in the past, they could easily have been called upon to assist in identification of the Iranian plane. In the circumstances, it is incredible that this solution was not used[149].

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[147] The frequency of U.S. forces' violations of Iranian territory is attested to by the numerous protests submitted by the Islamic Republic to the U.N. Secretary-General for distribution as Council documents. See, Exhibit 16.

[148] U.S. Preliminary Objections, p. 27.

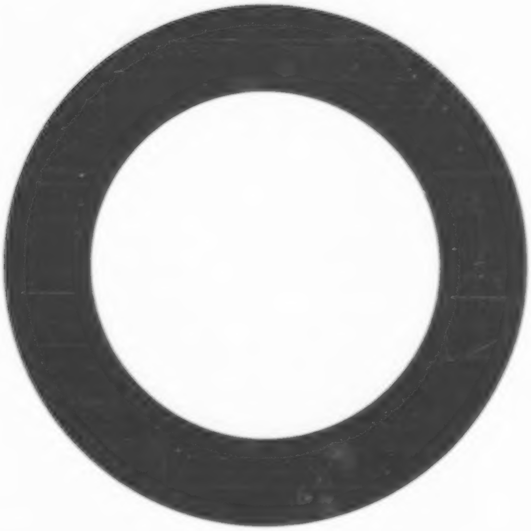
[149] See, ABC Nightline transcript, p. 4 (Exhibit 6) and Newsweek report, p. 12 (Exhibit 3).

2.101 In such circumstances - where the United States had violated the Islamic Republic's territorial sovereignty, attacked Iranian small patrol boats, and flagrantly ignored international treaty provisions designed to ensure the safety of international civil aviation - the responsibility for this incident lies wholly with the United States whose actions cannot be justified as a legitimate act of self-defense.

CHAPTER III CONCLUSIONS: THE RELEVANCE OF THE FACTS RELATING TO THE SHOOT-DOWN OF FLIGHT IR 655 TO THE JURISDICTIONAL ISSUES IN THIS CASE

2.102 In the preceding Section, the Islamic Republic has not endeavoured to present a full rebuttal of the version of events presented in the United States' Statement of Facts. However, it was essential to correct some of the United States' more blatant mischaracterizations of the events. The Islamic Republic was obligated to take this position by the fact that the United States' factual presentation is only relevant to a defense on the merits of the case, and in no way bears on its Preliminary Objections.

2.103 Nonetheless, the facts are relevant because they show that the actions of the U.S. forces in shooting down Flight IR 655 involved violations of provisions of the Chicago Convention, the Treaty of Amity and the Montreal Convention, in addition to the principles and rules of customary international law reflected in those conventions. The use of force against a commercial civilian flight is an explicit violation of all three treaties. Both the infringement of Iranian sovereignty by the U.S. warships during the shoot-down and the reckless disregard shown by the U.S. forces for commercial civilian air traffic, which reached its nadir in the shooting down of Flight IR 655, represent breaches of specific provisions of the treaties invoked. As such, the interpretation and application of



warships also unlawfully entered Iranian territorial waters and, the United States admits, opened fire on Iranian small boats. Meanwhile, Flight IR 655 was flying on course, on schedule, was signalling its civilian flight code, and was still within Iranian airspace, within its established air corridor, and on its scheduled flight path when it was shot down. It was President Reagan who described the Soviet's shooting down of KAL 007 as a "massacre" constituting an international crime. This judgment applies a fortiori in this case. It is a matter of regret that this far more serious incident was treated differently by the ICAO Council. It is for this reason that the Islamic Republic is now seeking justice before the Court.

2.106 The dispute arising from these events crystallized in the subsequent months as steps were taken by the Islamic Republic to seek redress from the United States both before the United Nations and before ICAO. This part of the facts will be taken up in the next Part.

PART III

THE RELEVANT FACTS CONCERNING NEGOTIATIONS AND THE EMERGENCE OF THE DISPUTE FOLLOWING THE SHOOT-DOWN

3.01 One of the United States' main jurisdictional objections rests on the contention that because the Islamic Republic made no attempt to resolve the dispute by negotiation or arbitration, it is precluded from relying on the Treaty of Amity and the Montreal Convention as bases of jurisdiction in this case. This argument stems from the language in Article 14(1) of the Montreal Convention providing that only disputes between two or more Contracting States concerning the interpretation or application of the Convention "which cannot be settled through negotiation" may be submitted to the Court and the reference in Article XXI(2) of the Treaty of Amity to the submission of disputes as to the Treaty's interpretation or application "not satisfactorily adjusted by diplomacy".

3.02 In advancing this thesis, the United States has sought to seize the moral high ground by arguing that while it repeatedly sought to offer ex gratia compensation for the families of the victims and to find ways to avoid such tragedies in the future, the Islamic Republic took an obstructionist view by refusing to negotiate and pressing for a "political condemnation[156]". Such self-serving statements are so divorced from the truth that they warrant a thorough rebuttal. In so doing, it is appropriate to recall that the scope of any requirement of prior negotiations is a function not only of the specific provisions of the compromissory clauses in question, but also of the facts and circumstances of each case.

3.03 As will be seen herein, the facts show that following the shoot-down, irreconcilable differences arose between the Parties as to the legal, circumstances surrounding the shoot-down, Dr. Velayati underlined the unreality of the United States' claim that the incident was the result of a mistake. Even so, he added, such a contention would not "reduce the heavy responsibility of the United States[157]". Referring to basic principles of international law, Dr. Velayati recalled that all States must refrain from the threat or use of force "against the territorial integrity and political independence of other States" and that they are "bound to refrain from any measure which may endanger international peace and security[158]".

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[156] U.S. Preliminary Objections, p. 42.

3.10 Dr. Velayati also drew attention to Article 44 of the Chicago Convention. He emphasized that the objective of the Convention was "to protect international civil aviation against acts of aggression[159]", and noted that "according to well-established principles of international law, the United States' criminal act of attacking a civilian airliner can never be justified under the term 'self-defense' particularly since the civilian airliner did not even have the potential of launching an attack[160]". Referring to repeated U.S. violations of Iranian sovereignty, Dr. Velayati recalled that "the Islamic Republic of Iran has officially and repeatedly protested against such breaches of international law through United States Interests Section in Tehran and has circulated its protest notes as documents of the Security Council[161]".

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[157] See, Statement of His Excellency Dr. Ali-Akbar Velayati, Minister for Foreign Affairs of the Islamic Republic of Iran, before the Special Session of the Security Council, 14 July 1988, p. 13. Exhibit 21.

[158] Ibid., p. 14.

[159] Ibid., p. 15.

[160] Ibid., pp. 16-17.

[161] Ibid., p. 20.

3.11 The Foreign Minister concluded by addressing the adverse consequences of the U.S. presence in the Persian Gulf which included (i) the tion of the principle of neutrality claimed by the United States in the war; (ii) iolation of the sovereignty of the Islamic Republic; and (iii) the prevention of xercise by the Islamic Republic of its sovereign rights. In his final remarks, /elayati insisted that the United Nations and other pertinent international es should "respond adequately to the serious concerns of the international ic opinion following this tragedy[162]".

3.12 In his address to the Security Council on the same day ge Bush, who was then the U.S. Vice-President, refused to accept any onsibility for the incident. Instead, he attempted to deflect attention from the t-down by arguing that the critical issue was not the "how and why" of the uction of Flight IR 655, but rather "the continuing refusal of the Government e Islamic Republic of Iran to comply with Resolution 598, to negotiate an o the war with Iraq, and to cease its acts of aggression against neutral ing in the Persian Gulf". Mr. Bush even insisted that the Islamic Republic ld declare its readiness unequivocally to comply with Resolution 598 - today, e first time, right here, now, before this body[163]".

3.13 Mr. Bush's argument that the Islamic Republic was to blame e destruction of Flight IR 655 because it had not accepted Resolution 598 xtraordinary in several respects. In the first place, Resolution 598 had ng to do with the actions that the United States took in the Persian Gulf st the Islamic Republic. If Resolution 598 had any relevance, it was with ct to paragraph 5 thereto, which the United States violated by stationing its

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Ibid., p. 23.

See, Exhibit 26, S/PV. 2818 at p. 52.

recognition of the "international responsibility" of the United States "for the criminal actions of its officials"; and (iii) "explicit condemnation of the use of weapons against the Iran Air passenger aircraft" by the United States[171]. It also noted that the "use of force against civil aircraft cannot be justified under any circumstances and is a flagrant violation of international law[172]".

3.18 In contrast, the United States gave a version of the facts which sharply conflicted with that of the Islamic Republic[173], although the U.S. representative conceded that the incident "cannot be considered in isolation[174]".

3.19 Throughout the discussions before the ICAO Council, this pattern repeated itself. The Islamic Republic continued to press the Council to recognize the existence of fundamental breaches of international law by the United States as a result of the U.S. military presence in the Persian Gulf[175], while the United States denied responsibility and sought to deflect attention from the legal issues by focussing on purely "technical" steps which could be taken to avoid similar incidents in the future.

3.20 At the final ICAO Council meetings in March 1989, the two Parties continued to stand on opposite sides, each firmly maintaining the divergent views they had previously expressed. Thus, at the 13 March 1989 session, the Islamic Republic reaffirmed the requests made to the Council in

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[171] C-Min. Extraordinary (1988)/1, 13 July 1988. Exhibit 40.

[172] Ibid., p. 6.

[173] Ibid., p. 9, et seq.

[174] Ibid., p. 9. This view undermines the United States' contention that the Islamic Republic has changed the nature of the case in its Memorial by discussing the background facts.

[175] See, for example, the intervention of the representative of the Islamic Republic on 5 December 1988, Draft C-Min. 125/12 (Closed). Exhibit 43.

)ecember for the legal consequences of the incident to be recognized, adding hat "the time is ripe for decisive action to be taken by the ICAO Council to lemonstrate its mandate enshrined in the Convention on International Civil \viation and in the principles of humanity[176]". The position articulated by the Inited States showed no sign of change from what had previously been advanced.

3.21 If further confirmation that the Parties' positions were reconcilable were needed, it was provided on the final day of the ICAO ouncil's deliberations when an amendment to the draft ICAO Resolution was roposed condemning the use of armed force against civil aviation, including the ct which resulted in the destruction of Flight IR 655[177]. Even this proposal, hich fell well short of the Islamic Republic's requests, was strongly objected to y the United States[178]. At the close of the debate before ICAO, therefore, the arties were no closer to bridging their differences than when the incident ccurred. If anything, the proceedings before the ICAO Council had revealed iat a negotiated settlement was impossible given the incompatibility between ach side's position.

HAPTER II THE REFUSAL OF THE UNITED STATES TO NEGOTIATE WITH THE ISLAMIC REPUBLIC

3.22 The United States makes much of the fact that shortly after ie facts of the incident became known, it announced its intention to compensate ie families of the victims on an ex gratia basis[179]. The United States says that to this it needed information about the victims' ages and earning capacity and iat because there were no diplomatic relations between the two States at the

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[76] See, Draft C-Min. 126/18, 13 March 1989, p. 7. Exhibit 47.

[77] See, Draft C-Min. 126/20, 17 March 1989, p. 5. Exhibit 49.

[78] Ibid., p. 6.

[79] U.S. Preliminary Objections, pp. 45, et seq.

> "In the case of Iranian victims, we will take appropriate measures to ensure that the money flows directly to the families and not to the government; we will provide none of these funds to the Government of the Islamic Republic of Iran[184]."

3.26 The same policy decision not to deal with the Government of the Islamic Republic was reflected in the State Department's communications to the Swiss Government filed here as Exhibit 24. On 31 August 1988, for example, the State Department cabled the U.S Embassy in Bern as follows[185]:

> "Department is in the process of investigating the mechanics of providing ex gratia compensation to the family members of those killed on Iran Air Flight 655 on July 3, 1988. Department has not worked out the details, but pursuant to the President's decision, the Government of Iran will not receive the compensation payments on behalf of its nationals."

The cable went on to spell out the United States' policy in very explicit terms:

> "Eventually the USG [United States Government] will also need to make payments to the family members in Iran, but is unwilling to deal directly with the Government of Iran to accomplish this."

The State Department then added:

> "To disburse payments, the GOS [Government of Switzerland] would have to establish a method of payment directly to the family members which had no risk of Government of Iran interference."

3.27 Shortly afterwards, the Swiss Government asked the United States to reconfirm that it was unwilling to deal with the Government of the Islamic Republic with respect to effecting compensation. The United States emphasized that this was the case. As a cable dated 6 September 1988 from the U.S. Embassy in Bern to Washington reported:

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[184] See, Exhibit 26, p. 51.

[185] Exhibit 24 (emphasis added).

> "Staehelin [the Chief of Political Division 1 (Europe and North America) of the Swiss Department of Foreign Affairs] asked whether unwillingness to deal directly with the Government of Iran to accomplish any payments to survivors was a *sine qua non* for the USG. Pol Off [U.S. Political Officer] noted that the decision that the Government of Iran would not receive compensation payments on behalf of its nationals had been made by President Reagan. This should be presumed to be an essential element of the USG inquiry[186]."

3.28 This position was further underscored by the State Department in a cable signed by Secretary of State George Shultz sent on 23 September 1988. It stated:

> "The USG wishes to make *ex gratia* payments to family members of those killed on Iran Air Flight 655, but continues to be unwilling to deal directly with the GOI [Government of Iran] to accomplish this[187]."

3.29 In contrast to the inflexible attitude of the United States, on 6 February 1989 the Iran Insurance Company wrote to the U.S. Interests Section of the Swiss Embassy in Tehran indicating that it had been designated as the representative of the beneficiaries and successors of the victims and others in respect of their losses arising out of the destruction of Flight IR 655 and was authorized to collect compensation due from the incident[188]. In its letter, the company declared that it was prepared to nominate its representative for determining damages and the method of collecting compensation in the matter.

3.30 In the light of the U.S. policy not to deal with the Islamic Republic or its agents and instrumentalities over the question of compensation, the United States wrote back to the Iran Insurance Company on 16 April 1989 asking for information as to the company's structure and management so that the

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[186] *Ibid*.

[187] *Ibid*. (emphasis added).

[188] *Ibid*.

United States could "determine whether it is an entity of the Government of Iran[189]." Rather than accept the Insurance Company's offer to name a representative to discuss compensation, the United States letter simply requested information to be provided regarding the victims and their successors.

3.31 Such a response was no more than a prevarication. The United States knew full well at the time that the Iran Insurance Company was wholly owned and operated by the Government of Iran and constituted an official governmental entity[190]. Not only did the Insurance Company's letter of 6 February 1989 bear the official seal of the Islamic Republic, it had been forwarded under cover of a Diplomatic Note from the Ministry of Foreign Affairs evidencing that it had the Government's full authorization and approval.

3.32 Moreover, from its experience before the Iran-U.S. Claims Tribunal, the United States was also well aware that the Iran Insurance Company had been named by U.S. companies as an official governmental entity in several cases before that Tribunal. It will be recalled that under the Algiers Declarations, Iran was defined as "the Government of Iran, any political subdivision of Iran, and any agency, instrumentality, or entity controlled by the Government of Iran or any political subdivision thereof[191]." Under Article II of the Claims Settlement Declaration between the Islamic Republic and the United States, claims by U.S. companies could only be directed against Iranian entities as so defined.

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[189] Ibid.

[190] The Iran Insurance Company was incorporated as a state-owned company on 6 November 1935. Its amended Articles of Incorporation were published in the Official Gazette of 25 February 1974 and in the Iranian Law Digest for the same year. In any event, all Iranian insurance and credit companies were nationalized by an act passed by the Islamic Revolutionary Council on 17 November 1979. Exhibit 24.

[191] See, Article VII(3) of the Claims Settlement Declaration.

3.33 In seven cases before the Iran-U.S. Tribunal, the Iran Insurance Company had been named as a respondent entity of the Government of Iran. In fact, as early as 27 May 1985, the Tribunal had held in the case of Component Builder, Inc. v. the Islamic Republic of Iran, et al. that the company fell within the definition of "Iran" as set forth in the Claims Settlement Declaration[192]. Accordingly, the United States was under no illusion as to the fact that the Iran Insurance Company was a governmental entity when it demanded assurances to the contrary in its letter of 16 April 1989.

3.34 What the United States' letter did underscore, however, was the continued refusal of the United States to enter into negotiations with the Islamic Republic over the matter. After all, the Islamic Republic, acting through the Iran Insurance Company had offered to name a representative to discuss the matter. This offer was not accepted by the United States. This same attitude endured up to the point when the Islamic Republic filed its Application on 19 May 1989, and even for several months afterwards, as the United States hesitated to name its Agent in the case.

3.35 Not only was the United States thus unwilling to deal with the Islamic Republic over the question of compensation, it was also unprepared to recognize the interests of the Government of the Islamic Republic in the matter. This is evidenced by the fact that the United States was only willing to discuss its own formula for *ex gratia* compensation for passengers on the plane (provided this was not done through the Government of the Islamic Republic), without addressing the Islamic Republic's own interests and damages arising out of the incident.

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[192] Award No. ITM/ITL 51-395-3, 27 May 1985, reprinted in 8 Iran-U.S. C.T.R. 216, at pp. 220-221. The other cases involved were as follows: Fortres-Icas-Continental Associates, v. the Islamic Republic of Iran and Sherkate Sahami Bimeh Iran (Case No. 301). Frank B. Hall & Company Inc., v. The Islamic Republic of Iran, the Central Insurance Company of Iran (Bimeh Markazi), Insurance Company of Iran (Bimeh Iran), Telecommunications Company of Iran (TCI) (Case No. 376) AFIA, v. Islamic Republic of Iran, Alborz Insurance Company, Bimeh Iran (Iran Insurance Company), Bimeh Markazi (The Central Insurance Company of Iran), Bimeh Melli (National Insurance Company, Ltd.), Bimeh Hafez (Hafez Insurance Company), and Shargh Societe Anonyme (Case No. 453). The Sentry Corporation, v. The Islamic Republic of Iran (Bimeh Iran) (Case No. 426). George W. Drucker, v. Foreign Transaction Company, Insurance Company of Iran, National Grain, Sugar and Tea Organization (Case No. 121). Fluor Corporation, v. Bimeh Iran (Iran Insurance Company) (Case No. 811). See Exhibit 24A.

3.36 It is readily apparent, however, that the Islamic Republic itself had important rights to espouse in the matter. As the late Judge Fitzmaurice's Treatise of *The Law and Procedure of the International Court of Justice* states, referring to Hersch Lauterpacht, there is an -

> "... important distinction between State rights and interests, and those of an individual person or entity, even where they relate to the same subject-matter or arise out of the same incident. Although a State on such an occasion speaks and acts for its national, its own position in relation to any wrong it has suffered in his person is never completely identified with his .... Thus, if there is a breach of a treaty an individual may suffer damage as the result, but his Government always has an independent ground of complaint in relation to the wrong it has itself suffered through the breach, in addition to the right of complaint on behalf of its national[193]."

3.37 Equally apparent was the United States' decision not to recognize or negotiate those interests. As Abraham Sofaer, the Legal Adviser to the U.S. State Department, stated to members of the U.S. Congress in his testimony regarding the incident, to the extent that any compensation *ex gratia* was accorded -

> "... this is compensation for the victims' families, and not intended for the states involved.

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[193] Fitzmaurice, G.: *The Law and Procedure of the International Court of Justice*, Vol. II, Cambridge, Grotius, 1986, pp. 670-671. *Exhibit 25*.

The President in effect has made it clear that he does not intend to compensate Iran for the plane[194]."

3.38 It is also striking that the United States' refusal to deal with the Islamic Republic was in stark contrast to its attitude towards other States which had nationals killed on Flight IR 655. In a State Department briefing on the question of compensation held on 17 July 1989 (more than a year after the incident and after the Islamic Republic had instituted these proceedings), it was confirmed that other governments were receiving money directly from the United States Government for the shoot-down while the Islamic Republic was not. The exchange with the State Department's spokesman went as follows:

"Q: You say that only the Government of Iran is being asked to find an intermediary to distribute the payments but that the other governments are getting the money directly?

A. That's the case, yes[195]."

3.39 These documents show beyond any doubt that prior to the iling of the Islamic Republic's Application, negotiations between the two Parties were impossible, not simply because of the fundamental differences in each side's position, but also because of the United States' categorical refusal to have any

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[94] Hearings before the Defense Policy Panel of the U.S. House of Representatives, H.A.S.C. No. 100-119, 100th Cong. Second Sess., 1988, p. 59, Exhibit 26. Of course, the Islamic Republic claims not simply for the plane, but for the various violations by the United States of its treaty obligations, as well as on behalf of the victims.

[95] Department of State Daily Press Briefing, 17 July 1989. Exhibit 27. At p. 52 of its Preliminary Objections, the United States makes certain allegations concerning compensation that family members of non-Iranian victims are said to have received. The Islamic Republic has no information regarding these payments, and thus reserves its position on the issue.

dealings with the Government of the Islamic Republic on the key issues[196].

SECTION B. The Hearings Before the Defense Policy Panel of the U.S. House of Representatives

3.40 As alluded to above, the hearings before the Defense Policy Panel of the Committee of Armed Services of the U.S. House of Representatives held in August, September and October 1988 provide further evidence of the unwillingness of the U.S. Government to admit legal liability or to deal with the Government of the Islamic Republic. It is important to recall that the Panel was aware of the position publicly held by the Islamic Republic on the incident since in the course of the hearings the Chairman of the Panel quoted a statement given by the Iranian Foreign Minister on 15 July 1988 at a news conference at the United Nations to the effect that:

> "The U.S. compensation offer will be acceptable to Iran only within the context of the United States accepting responsibility for shooting down the Iranian airliner[197]."

3.41 With respect to the question of responsibility, the State Department's Legal Adviser, Mr. Sofaer, advanced the same self-defense argument previously raised by Mr. Bush, arguing that "the damage caused, in our judgement, was pursuant to the lawful use of force". He added: "we agree completely ... that Iran is to blame ultimately for this accident[198]". With respect to the question whether the United States would be willing to deal directly with the Islamic Republic, Mr. Sofaer left no doubt as to the United States' position. He asserted:

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[196] In contrast, in other cases the United States has made ex gratia payments directly to the Governments concerned. Thus, the United States made ex gratia payments to the Government of Japan for radiation injuries to a Japanese fishing boat and crew caused by atomic testing in the Pacific as well as to the Government of Mexico for injuries to Mexican citizens injured in attempting to cross the U.S.-Mexico border. See, Yates, G.T.: "State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era", in International Law of State Responsibility for Injuries to Aliens (ed. Lillich, R.), 1983, p. 220. Exhibit 28.

[197] See, Hearings Before the Defense Policy Panel of the House of Representatives. Exhibit 26, p. 61.

[198] Ibid., p. 49.

> "We are not going to work through the Government of Iran. We are not going to permit the Government of Iran to take any of this money, to the fullest extent of our ability to prevent it[199]."

3.42 Professor Harold Maier, another witness before the Congressional Panel, argued that the Islamic Republic "would like to use the incident as a political tool" and that there were "no illusions about whether the Iranian citizens themselves would actually get the money[200]". Such remarks should be beneath comment. Nonetheless, they reveal the extent of hostility that existed in the United States at the time against any thought of dealing with the Government of the Islamic Republic on the dispute. They demonstrate in addition that the United States had made up its mind beforehand that direct discussions with the Islamic Republic were a practical and political impossibility.

3.43 In this connection, it is important to recall that for funds to be appropriated for any compensation involving Flight IR 655, congressional approval was required. Yet the attitude of the Members of Congress on the Defense Policy Panel demonstrates that they were no more willing than the administration to deal directly with the Government of the Islamic Republic on the issue.

3.44 In the course of the hearings, for example, Congressman Darden told Mr. Sofaer that "the only way you are going to get any congressional approval of your intentions to make these payments is that the Congress be absolutely and totally satisfied that the proper people receive these payments under terms and conditions which would carry out the humanitarian purposes that you outline[201]". The mood of the Panel was summed up by the Chairman who asked Mr. Sofaer:

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[199] Ibid., p. 55.

[200] Ibid., p. 31.

> "Is there a guarantee that if we cannot be absolutely certain that this will go to the people and not to the government that we will not pay the money? ... I think that would be something if you are talking about bipartisan cooperation with Congress, I think we would like to see some absolute guarantees. I am not even sure that with that, that it would be something that people would like to go along with in Congress. There is going to be some problem on the issue[202]."

SECTION C. The Iran-U.S. Claims Tribunal Did Not Afford an Opportunity To Negotiate

3.45 Notwithstanding the United States' refusal to deal with the Islamic Republic on the issue, the United States alleges that one of the fora that the Islamic Republic could have used to negotiate its claims was the Iran-U.S. Claims Tribunal in The Hague[203]. In the light of the purpose of the Claims Tribunal and U.S. policy towards the Islamic Republic over questions of responsibility and compensation, the suggestion that the Claims Tribunal could have provided a negotiating forum for the destruction of Flight IR 655 is entirely misplaced.

3.46 In the first place, it has already been shown that official U.S. policy precluded any negotiations that would have resulted in an admission of liability by the United States or the payment of any compensation to the Government of the Islamic Republic. The United States has offered no evidence to demonstrate why this same policy would not have applied to contacts between the two States at the Iran-U.S. Claims Tribunal. Indeed, had the United States been genuinely interested in dealing with the Islamic Republic on the matter, it could have attempted to raise it with the Iranian Agent or other officials at the Tribunal instead of going through the Swiss Government in Bern. The fact that it did not do so was attributable to the decision that had been made at the highest evels of the U.S. Government to avoid what was said to be Iranian "interference" n the matter.

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[201] Ibid., p 73.

[202] Ibid., p. 60. Speaking later, the Chairman added:

> "We are dealing with, I think, a very difficult and sensitive issue here that I hope you understand just the politics of this whole issue of the kind of general visceral reaction against the Iranian Government which runs very, very deep". Ibid., p. 70.

[203] U.S. Preliminary Objections, pp. 155-157.

3.47 Even if U.S. policy had not precluded meaningful discussions, the Iran-U.S. Claims Tribunal would not have been an appropriate forum in which to negotiate the issue given that any negotiations under the auspices of the Tribunal had been intentionally limited by both Governments to claims already filed with the Tribunal. Due to domestic sensitivities in each country concerning contacts with the other, both Governments emphasized the limitations of the forum of the Tribunal not to trespass on areas falling outside of ts jurisdiction and the need to avoid burdening the work undertaken at the Tribunal with matters not falling within the Tribunal's mandate. In short, the representatives of both governments at the Tribunal had no authorization to discuss any matters falling outside of the jurisdictional parameters established by he Algiers Declarations.

3.48 Moreover, the assertion by the United States that from 3 uly 1988 to 17 May 1989 representatives of the two Governments held face-to-ace meetings no less than 16 times is grossly exaggerated. High level meetings between the principal legal advisers of the two countries were suspended in late 986 due to the Reagan administration's embarrassment over the so-called

"Irangate" affair. After that incident, United States officials were extremely wary of dealing with Iranian representatives at the Tribunal even on official Tribunal matters. Indeed, from November 1986 until the date that the Islamic Republic's Application was filed with the Court (17 May 1989), no high level meetings between the Parties' principal legal advisers occurred. There was thus no realistic possibility of the Iran-U.S. Claims Tribunal providing an appropriate forum to negotiate the issues arising out of the destruction of Flight IR 655.

3.49 The United States suggests that negotiations at the Tribunal were possible because the two governments were able to reach a settlement in Case B/1 (Claim 4), over the amount owed by the United States to the Islamic Republic for various categories of military equipment, and because Iranian and U.S. arbitrators at the Tribunal were also able to agree on the appointment of neutral arbitrators. The United States' suggestion that such limited discussions could have any relevance to possible settlement of this case is quite incomprehensible. The United States fails to mention that the negotiations over Case B/1 (Claim 4) did not start until September 1989, after the filing of the Application. It also fails to mention that the appointment of neutral arbitrators was only achieved after repeated interventions from the relevant Appointing Authority.

CHAPTER III DEVELOPMENTS AFTER THE FILING OF THE APPLICATION

3.50 The foregoing discussion has shown that there was no possibility of negotiating a settlement of the dispute before the Islamic Republic filed its Application. There was simply no interest or incentive for the United States to deal directly with the Islamic Republic on the matter. It was only after the Application had been filed and Agents appointed that discussions were attempted at The Hague. These meetings took place on 1 September 1989 and

12 September 1989 at the Peace Palace shortly after the United States finally nformed the Court of its appointment of an Agent in the case.

3.51 These initial two meetings were followed by four more neetings between the legal advisers of the two Parties in late 1989 during which he issues of liability and methods of compensation were broadly discussed. Iowever, it rapidly became apparent that the United States remained unwilling o accept any legal responsibility for the incident. Accordingly, by the end of 1989 he talks broke down, and no further meetings were held on the matter.

3.52 In these circumstances, it cannot be maintained that the ourt lacks jurisdiction because the Islamic Republic failed to attempt to resolve he dispute through diplomacy or negotiations. Prior to the institution of these roceedings, the United States refused to have any contacts with the Islamic epublic regarding the incident. The limited talks that took place after the filing f the Application confirmed the deadlock that had previously arisen and emonstrated that because the Parties' positions were irreconcilable, any hope of negotiated settlement was doomed to failure. As the following Chapter will how, in such circumstances international law does not impose an absolute bligation on the parties to continue with negotiations, particularly when the ispute is shown to be one that cannot be expected to be settled or adjusted by iplomacy.

HAPTER IV THE LIMITATIONS TO THE LEGAL REQUIREMENT OF PRIOR NEGOTIATIONS

3.53 While this subject will be dealt with in greater detail in onnection with the specific provisions of the Montreal Convention (Part V) and he Treaty of Amity (Part VI) where it will be shown that the prerequisite that egotiations precede the submission of the present dispute to the Court has been fully met to the extent that this is required by the relevant treaty provisions, it is opportune here to consider, by way of general introduction to those Parts, the elements by which the requirement of prior negotiations is ordinarily characterized. To this end, the present Chapter will briefly review the rationale and significance of the relevant international clauses and survey the relevant case law of the Permanent Court and the present Court on the issue.

3.54 Close scrutiny of the requirement of prior negotiations shows that:

- The requirement of prior negotiations presupposes that negotiations will be carried out in good faith. A party that refuses as a matter of policy to deal with the other party on a dispute between them fails to demonstrate even a minimum level of good faith, and thus cannot be heard to complain that the other party did not pursue the negotiations.

- Moreover, the original rationale behind this requirement has been remarkably played down by the Court. The Court has essentially construed the requirement as a means of ascertaining whether a legal dispute has arisen between the contending States.

- In addition, the Court has interpreted the requirement of prior negotiations to the effect that it does not entail an obligation to pursue negotiations when it is clear that the dispute cannot be expected to be settled by negotiations or when one side refuses to negotiate with the other or is adamant in its position.

SECTION A. The Emergence in Modern International Arbitration of the Prior Negotiations Requirement and Its Ratio

3.55 Clauses requiring States to settle their disputes by negotiations before submitting to arbitration appeared chiefly in what was considered as the heyday of arbitration, i.e., towards the end of the 19th Century. In noting only the most important texts, which contained such clauses, reference can be made to Article 20 of the 1st Hague Convention of 29 July 1899, Article 38 of the 1st Hague Convention of 18 October 1907, and Article 13 of the Covenant of the League of Nations.

3.56 Clearly, the prior negotiations clause had not been regarded as necessary in previous arbitrations, when the method of submitting disputes to arbitration was almost exclusively by means of a compromis (which, as is well known, always concerns a dispute that has already arisen). The clause at issue was instead regarded as necessary when compromissory clauses concerning future disputes became widespread.

3.57 Despite the strict interpretation placed on such clauses by the Permanent Court, which greatly limited their scope (a point which will be addressed presently), they continued to be used in subsequent treaties[204]. These clauses were motivated by, and were indicative of, the tendency of States to give preference to the amicable, out-of-court settlement of their differences as opposed to international adjudication or third-party judicial settlement. The primary purpose of such clauses was to safeguard as much as possible a State's sovereignty. Whenever States go to the length of agreeing to submit to arbitration, this submission is immediately accompanied by a significant proviso:

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[204] Suffice it to mention here some of those of a general purport: Article 1 of the General Act of the Peaceful Settlement of International Disputes of 26 September 1928 and Article 1 of the revised text of this Act of 28 April 1949.

the prestige and interests of States should not be harmed by a summons to appear before an international court when the State concerned could easily have acceded to the demands of the complainant State before being made answerable in court.

3.58 It is thus plain that the clauses were intended as a sort of stumbling block on the road to judicial settlement for the sake of protecting State sovereignty. In other words, States, as soon as they agreed to submit to arbitration, hastened to narrow the scope of their obligation, by providing escape clauses designed to render arbitration a last resort. As Anzilotti rightly pointed out in 1915, it is significant that most of the clauses requiring the prior exhaustion of negotiations also excluded from arbitration matters impinging upon the "independence", "honor" or "integrity" of States[205].

SECTION B. The Case Law of the Permanent Court

3.59 As soon as a standing international tribunal, the Permanent Court of International Justice, was set up in 1922, it became apparent that many of the clauses that previously qualified the acceptance by States of their submission to arbitration were incompatible with the primacy of adjudication. State sovereignty could no longer be said to hold sway. As a result, not only were the traditional clauses excluding from jurisdiction matters pertaining to the "independence", "honor", etc. of States jettisoned, but in addition no clause concerning the prior exhaustion of negotiations was placed in the Statute of the Permanent Court.

3.60 It is indeed striking that while the Advisory Committee of Jurists entrusted with the task of drafting the Statute of the Permanent Court proposed a rule (Article 33) concerning the prior exhaustion of diplomatic negotiations, this rule was not taken up either by the League Council or by the Assembly and, consequently, no such provision can be found in the Statute of the Court[206].

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[205] See, Anzilotti, D.: Corso di diritto internazionale, Vol. III, Part I, Rome, 1915, pp. 68-69.

3.61 It is therefore only natural that, once confronted with compromissory clauses that nevertheless included the requirement of prior negotiations, the Court should have placed a restrictive interpretation on these clauses so as considerably to reduce their scope.

3.62 This the Court achieved by propounding two concepts: first, the requirement in question was primarily conceived of as a means of making it possible for a legal dispute proper to take shape between the contending parties. Since a legal dispute is a conflict between legal claims, a disagreement on a point of law or fact, the Court stated that the legal positions of the parties should clearly come to the fore in the course of the exchange of notes or in diplomatic negotiations. It is thus apparent that the rationale of the requirement for prior negotiations was no longer founded in the need to safeguard State sovereignty as much as possible from third-party adjudication, but rather in the need for the Court to be seized with a full-fledged legal dispute.

3.63 Secondly, it follows from the foregoing that, seen in this perspective, the requirement of prior negotiations does not entail the need for negotiations to be prolonged and intense. As soon as it becomes apparent that one party is unwilling to settle the matter by bilateral talks or to compromise its position and that the parameters of the dispute have been set out, it is no longer necessary to wait before instituting judicial proceedings.

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[206] See, Permanent Court of International Justice, Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee 16 June-24 July 1920, at p. 726.

3.64 This position was clearly articulated by the Court in one of its first cases, the Mavrommatis case. In that case, the respondent State, Great Britain, argued that the compromissory clause upon which Greece relied (Article 26 of the Mandate for Palestine) established as a precondition for submitting a dispute to the Court that it be one that "cannot be settled by negotiation". Great Britain maintained that because negotiations had not been exhausted - Greece, after receiving a British note of 1st April 1924 responding to a previous Greek note of 26 January 1924, had applied to the Court on 12 May 1924 without further delay - the condition set out in the compromissory clause had not been fulfilled[207].

3.65 The Court rejected the British objection by making three points. First, it specified that the primary purpose of prior negotiations was to make it possible for a legal dispute to take shape:

> "The Court realises to the full the importance of the rule laying down that only disputes which cannot be settled by negotiation should be brought before it. It recognises, in fact, that before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations[208]."

3.66 Second, the Court insisted that in any case negotiations may be relatively short:

> "Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can

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[207] Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 13.

[208] Ibid., p. 15.

> therefore be no doubt that the dispute cannot be settled by diplomatic negotiation[209]."

3.67 Third, the Court attached importance to the views of the parties concerned on the question whether the negotiating process was likely to yield results or was instead destined to lead to deadlock. It stated that -

> "... in applying this rule [on prior negotiations], the Court cannot disregard, amongst other considerations, the views of the States concerned, who are in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiation[210]".

3.68 In the light of this last pronouncement, it would seem that the Court's view must be interpreted to the effect that it is for the parties themselves to assess the political nature of their relations as being (or not being) conducive to a possible out-of-court settlement. To put it another way, it is not for the parties to state whether or not negotiations may be undertaken (each of them may hold a different view on the matter); rather, it is for each party to appraise the general political context of their relations for the purpose of deciding whether or not negotiations constitute a realistic avenue open to them. It goes without saying that, as the Court explicitly stated, the views of the parties are merely one of the various factors to be taken into account by the Court.

3.69 It is noteworthy that the Court's view on this point has remained consistent in its subsequent case law. For example, this view was later taken up by one of its most distinguished members, Manley O. Hudson, in 1939, who stated in his Dissenting Opinion in the Electricity Company case:

> "The provision in Article 1 of the Treaty [of Conciliation, Arbitration and Judicial Settlement, of 1931, between Belgium and

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[209] Ibid., p. 13 (emphasis in the original).

[210] Ibid., p. 15.

> Bulgaria], that the dispute must be one which it may not have been possible to settle by diplomacy, is not a meaningless formality. In the past the Court has drawn attention to the importance of prior negotiations [in the *Mavrommatis* case, Series A, No. 2, p. 15], and where the requirement is expressly laid down in a treaty it cannot be disregarded. What is essential is that prior to the filing of an application by one party bringing the dispute before the Court, *the other party must have been given the opportunity to formulate and to express its views on the subject of the dispute*. Only diplomatic negotiations will have afforded such an opportunity. The precise point at which it may properly be said that the negotiations instituted cannot result in a settlement of the dispute may have to depend, as the Court has also recognized [Series A, No. 2, p. 15], upon 'the views of the States concerned'[211]."

3.70 It is apparent from the above that the Court construed the clauses on prior negotiations in such a way as to deprive them of their original, sovereignty-oriented rationale. Indeed, prior negotiations were no longer required as a means of impelling States to settle their disputes out of court. They were now conceived of as a means of ascertaining whether a disagreement on a point of law or fact had emerged between two or more States, and, if so, what the content of this conflict of legal claims was.

3.71 It follows that compromissory clauses calling for prior negotiations have been interpreted in a realistic manner, and even downplayed, according to circumstances of the case. As was aptly emphasized by the learned author, N. Kaasik, the interpretation advanced by the Court actually "led to the thwarting, or almost, of the condition of prior negotiations[212]."

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[211] *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, Dissenting Opinion of Judge Hudson, at pp. 132-133 (emphasis added).

SECTION C. The Debates at the Institut de Droit International in 1956 for the Suppression of the Requirement of Prior Negotiations

3.72 The case law of the Permanent Court contributed to convincing a number of distinguished international lawyers that the clause on prior negotiations had become a relic of the past no longer compatible with the essence of modern adjudication. Therefore, when in 1952-1956 the Institut de Droit International met to discuss a draft model clause on the compulsory jurisdiction of the present Court, a few eminent jurists proposed that the requirement of prior negotiations, upheld by the rapporteur Guggenheim, be dropped altogether. Among these, mention can be made of Jessup (American), Rolin (Belgium), Andrassy (Yugoslav), de la Pradelle (French), Vallindas (Greek) and Waldock (British)[213]. As a result of these suggestions, the clause was deleted from the draft resolution[214].

3.73 It is of interest here to quote the views forcefully set out by two of these eminent lawyers, Jessup and Waldock. The former pointed out that

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[212] Kaasik, N.: "La clause de négociations diplomatiques dans le droit international positif et dans la jurisprudence de la Cour Permanente de Justice internationale", in Revue de droit international et de législation comparée, Vol. 14, 1933, p. 81. Exhibit 29. See, also, pp. 90-92, ibid., and Soubeyrol, J.: "La négociation diplomatique élément du contentieux international", in Revue de droit international public, Vol. 68, 1964, pp. 334-335. Exhibit 30.

The sentence by Kaasik cited above reads in the original French version:

"L'interprétation de la Cour aboutit à une annulation ou presque de la condition de priorité des voies diplomatiques".

[213] See, Annuaire de l'Institut de Droit International, Vol. 46, 1956, pp. 197-206. Exhibit 31.

[214] Ibid., pp. 217, 263-264. For the text of the resolution, see, Institut de Droit International, Tableau général des résolutions (1873-1956), Bâle, 1957, pp. 160-161. Exhibit 32.

"this formula, which has been used in very numerous old treaties, seems to be a survival from the period in which Governments balked at submitting their disputes to the Court. This period must now be regarded as gone by, and in any case the Institut must not encourage this hesitation of Governments[215]". The latter, after supporting the view of Jessup, emphasized that the clause at issue, if upheld, would only result in encouraging the parties to raise preliminary objections with a view to using delaying tactics[216].

3.74 The debates in the Institut de Droit International and the resolution eventually adopted testify to the sharp decline in the importance of the clauses at issue. By the same token, those debates were indicative of the widely felt need to interpret the existing clauses on prior negotiations as strictly as possible[217].

SECTION D. The Case Law of the Present Court Confirms the Interpretation of the Permanent Court

3.75 The present Court has not departed from the interpretation placed by its predecessor on clauses on prior negotiations. It may suffice here to mention briefly the most important cases.

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[215] Unofficial translation. The original French text reads: "Cette formule qui a été employée dans de très nombreuses conventions anciennes paraît être seulement une survivance de la période au cours de laquelle les gouvernements étaient hésitants à soumettre leurs différends à la Cour. Cette période doit être maintenant considérée comme révolue et en tout cas l'Institut se doit de ne pas encourager cette hésitation des gouvernements", Annuaire de l'Institut de Droit International, pp. 197-198.

[216] "Le seul résultat qu'aurait l'insertion de la clause traditionnelle serait d'inciter les parties à soulever des exceptions préliminaires et à utiliser des moyens dilatoires" ibid., p. 205.

[217] These views are also consistent with the provisions of Article 33 of the U.N. Charter which does not provide for any hierarchy between solutions reached by "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or managements, or other peaceful means". Thus, under the U.N. Charter, settlement by judicial settlement is placed on an equal footing as settlement by negotiation.

3.76 In the preliminary objections phase of the South West Africa case, for example, the Court focused on the question of the duration of negotiations, as well as on the issue whether it was admissible, for procedural purposes, that such negotiations should take place not in a bilateral framework but within a parliamentary framework such as the United Nations.

3.77 On the first issue, the Court, after quoting the Mavrommatis case, pointed out that in the case with which it was dealing "a deadlock on the issues of the dispute was reached and has remained since", and that "no modification of the respective contentions [had] taken place since the discussions and negotiations in the United Nations[218]".

3.78 On the second issue the Court stated that -

> "[I]t is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant, and this is obvious even from their oral presentations before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties[219]".

It is worth noting that the views expressed by the Court on this matter were forcefully taken up, in their Separate Opinions, by Judges Bustamante and Jessup[220].

3.79 A compelling restatement of the Court's view can be found in the Separate Opinion of Judge Wellington Koo in the Northern Cameroons case. In quoting the previous case law, he framed the question in the following, particularly lucid, terms:

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[218] South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319, at p. 346.

[219] Ibid.

[220] Ibid., pp. 381-382 and 435-436.

> "[I]t is to be recalled that both the Permanent Court and this Court have stated to the same effect that when the parties to a dispute have both defined their position and have both clearly indicated that they insist upon their respective views with no possibility of any modification or compromise, and when a deadlock is thus reached, it can be reasonably concluded that the dispute cannot be settled by negotiation. No particular form or procedure of negotiation is required, nor is any importance to be attached to the duration of such negotiation[221]".

3.80 The Court took up this line of reasoning in two subsequent cases. In the Diplomatic and Consular Staff case, it held in 1980 that the requirement of prior negotiations was met both because there was a conflict of views between the two parties and because the "refusal of the Iranian Government to enter into any discussion of the matter" had brought about a deadlock, although only 3 weeks had passed since the incident and the United States' application instituting proceedings[222].

3.81 In the Nicaragua case, the Court further developed its anti-formalist doctrine. It held that the failure, by Nicaragua, to refer expressly to a particular treaty in the course of its negotiations with the United States did not debar Nicaragua from invoking before the Court the compromissory clause of that treaty[223]. In other words, in the view of the Court the requirement under discussion is met even if in the course of negotiations the parties do not advert to the treaty that the applicant State subsequently relies upon as the basis for the Court's jurisdiction.

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[221] Northern Cameroons, Judgment, I.C.J. Reports 1963, Separate Opinion of Judge Wellington Koo, p. 15, at p. 49.

[222] United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 3, at p. 27, para. 51.

[223] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392, at p. 428, para. 83.

3.82 The long-standing tradition of the Court on the matter at issue was cogently summed up by Judge Ago in his Separate Opinion in the Nicaragua case where he underlined, in particular, the limitations to which the prior negotiation requirement is subjected. After quoting the relevant treaty provision (whereby "any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy" could be submitted to the Court), Judge Ago went on to say the following:

> "It is not always necessarily the case under these terms that diplomatic negotiations must be ascertained to have been first begun and then pursued, and finally to have broken down. The requirements of the text can even be met, under certain circumstances, without negotiations in the strict sense ever having taken place. More generally speaking, I am in fact convinced that prior resort to diplomatic negotiations cannot constitute an absolute requirement, to be satisfied even when the hopelessness of expecting any negotiations to succeed is clear from the state of relations between the parties, and that there is no warrant for using it as a ground for delaying the opening of arbitral or judicial proceedings when provision for recourse to them exists[224]"

3.83 A similar clause was considered by the Court in its Advisory Opinion of 26 April 1988 on Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947. Under Section 21(a) of the Headquarters Agreement between the United States and the United Nations, disputes could be submitted to arbitration if they were "not settled by negotiation or other agreed mode of settlement".

3.84 When a dispute arose between the United States and the United Nations over the status of the PLO Observer Mission, the United States

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[224] Ibid., I.C.J. Reports 1984, at pp. 515-516, para. 4 (emphasis added).

Permanent Representative to the U.N. proposed to the U.N. Secretary-General that the negotiations phase of the procedure should commence on 20 January 1988. A series of consultations were held until February 1988; technical discussions, on an informal basis, were also held between 28 January and 2 February 1988. However, the United States subsequently stated that it did not consider these contacts and consultations "to be formally within the framework of Section 21(a) of the Headquarters Agreement" and noted that it could not "enter into the dispute settlement procedure outlined in Section 21 of the Headquarters Agreement". The Court did not uphold this objection. It held that:

> "Taking into account the United States' attitude, the [U.N.] Secretary-General has in the circumstances exhausted such possibilities of negotiation as were open to him[225]".

3.85 Once again, the Court took a flexible and broad view of the prior negotiations clause. It did not attach value to the United States' contention that no negotiations proper had taken place; it instead held that contacts and consultations, however informal, were sufficient to meet the requirements at issue. This confirms that, whatever the view of one of the parties, what really matters for the Court is that some attempt at contact or negotiation should have been made, provided of course there was at least a minimum chance of settlement.

3.86 More recently, the matter at hand has been discussed by Judge Bedjaoui in his Dissenting Opinion in the case of Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie. Following up on some of the themes that Judge Ago had enunciated in the Nicaragua case, Judge Bedjaoui dwelt, inter alia, on the fact that under certain circumstances the requirement of prior negotiations need not be met owing to the adamant position taken by the contending parties. He made the following remarks:

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[225] Applicability of the Obligation to Arbitrate under Section 21 of the Unite Nations Headquarters Agreement of 26 June 1947, Order of 9 March 1988, I.C.J. Reports 1988, p. 3, at p. 33, para. 55.

> "Since Libya refused to extradite its nationals and proposed substitute solutions (surrender of the two suspects to the United Nations, to the Arab League, to the judicial authorities of a third country, or to an international judicial or arbitral body, whereas the United Kingdom and the United States only offered Libya the choice between an extradition that as a matter of principle was not negotiable or the adoption of sanctions by the Security Council), it was obvious that the very notion of a negotiating process was meaningless in such a context[26]."

3.87 Judge Oda voiced a similar conclusion. He noted that, in he circumstances of the case -

> "... there does not seem to exist any convincing ground for asserting that the Court's jurisdiction is so obviously lacking. The Respondent's argument whereby the Court's jurisdiction is denied through the non-lapse of the six-month period would appear too legalistic, if one were to find that no room remained to negotiate on the organization of arbitration in the face of a categorical denial of the possibility of an arbitration[27]."

3.88 The Lockerbie case is significant in this respect inasmuch as ne of the main arguments advanced by the Respondent States in opposing urisdiction was that the negotiation and time-limit requirements of Article 14(1) f the Montreal Convention had not been satisfied by the Applicant. In its Order, he Court did not accept this argument and, in fact, did not even address the point s might have been expected if it had presented an obstacle to the Court's urisdiction. To the contrary, as several of the separate and dissenting opinions oted, given that the Respondents had effectively refused to negotiate, the provisions of Article 14(1) did not present a bar to jurisdiction. Indeed, as Judge Weeramantry noted, the refusal to negotiate in effect constituted an anticipatory breach of the provisions of Article 14(1) by the Respondent States[228] - a view that was shared by Judge Ajibola[229].

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[26] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya v. United States of America), Order of 14 April 1992, I.C.J. Reports 1992, p. 145, para. 8.

[27] Ibid., Declaration of Judge Oda, p. 136, (emphasis added).

3.89 Once again, therefore, the case law of the Court on the practical inapplicability of the prior negotiations requirement in cases of clear, repeated and irreconcilable disagreements between the contending States, has been forcefully reaffirmed.

SECTION E. Concluding Observations

3.90 The authoritative opinions of the Judges cited above constitute the logical development and outcome of a long judicial process whereby the prior negotiations requirement has been increasingly restricted in its importance and scope. The case law surveyed above proves beyond any doubt that:

- The primary purpose of the clause is to make it possible for a legal disagreement between two States to take shape in such a manner as to enable the Court to identify the terms of this disagreement;

- To the extent that there may be a requirement of prior negotiation, this presupposes the good faith of the parties. When one party to a dispute refuses to deal with the other, its good faith is lacking and it cannot thereafter complain about any lack of negotiations;

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[228] Ibid., Dissenting Opinion of Judge Weeramantry, p. 161.

[229] Ibid., Dissenting Opinion of Judge Ajibola, p. 188.

- By the same token, whenever it becomes apparent that the parties to a dispute have clearly defined their legal positions and insist upon their respective views without appearing to be open to compromise, the resulting deadlock makes it superfluous for them to try and settle the matter by bilateral (or multilateral, for that matter) negotiations. In these cases it is not strictly necessary for negotiations even to commence. To hold the contrary view would result in the requirement at issue becoming an unacceptable means of delaying recourse to international adjudication - as Waldock noted in 1956 in the Institut de Droit International and Ago restated in 1984 in the Court;

- Some allowance should be made by international courts for the views that the parties concerned may have expressed about the very feasibility of negotiations, in the light of the general political context of their relations.

3.91 In Parts V and VI below it will be shown that, by instituting proceedings before the Court against the United States, the Islamic Republic has fully met the prior negotiations requirement, in so far as it is laid down in the relevant treaties.

PART IV

THE JURISDICTION OF THE COURT OVER THE ICAO COUNCIL DECISION OF 17 MARCH 1989 PURSUANT TO ARTICLE 84 OF THE CHICAGO CONVENTION

4.01 The United States' objection to the jurisdiction of the Court pursuant to Article 84 of the Chicago Convention is based essentially on one issue: the Islamic Republic's alleged failure to follow the procedures set out in the ICAO Council's Rules for the Settlement of Differences ("the Rules")[230]. The United States argues that the Islamic Republic did not properly submit a dispute under Article 84 to the Council pursuant to the Rules, that the Islamic Republic's submission to the Council was not dealt with under the Rules, and that the Council did not render a decision of the kind foreseen in the Rules that can be appealed to the Court.

4.02 Before turning to these arguments, it is important to note what the United States does not contest. It does not contest that the Islamic Republic submitted a dispute to the ICAO Council concerning violations of the Chicago Convention by the United States[231] - a dispute defined by disagreements arising from (i) the shoot-down of Flight IR 655, (ii) the issuance by the U.S. of illegal NOTAMs, and (iii) the lack of coordination by U.S. military forces with civilian ATS authorities. It does not contest the fact that the Chicago Convention is applicable to this dispute, nor does it contest that the ICAO Council had jurisdiction to render a decision on this dispute. It does not even contest that this was a dispute over the interpretation and application of the

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[230] Exhibit 33.

[231] The words "dispute" and "disagreement", which are the relevant words in Article 84 of the Chicago Convention, are used interchangeably in this Part. It is the Islamic Republic's view, however, that the use of the word "disagreement" in the relevant part of Article 84 of the Convention establishes a lower threshold test than that which would be required to show a dispute existed.

Chicago Convention. The argument of the United States is based on purely ormalistic reasoning: that the Rules were not applied, and therefore the dispute id not fall within Article 84. It contends that the failure to apply the Rules hould act as a bar to the Court's jurisdiction.

4.03 The Islamic Republic will address this argument in detail in his Part. In Chapter I, it will be shown that the jurisdiction of the Court over decisions of the ICAO Council is governed not by a set of procedural rules dopted by the Council by a simple majority vote, but by Article 84 of the Convention. It is this Article to which States' parties to the Convention have consented and the real question in this case therefore is whether the requirements f Article 84 have been fulfilled: i.e., whether a disagreement over the nterpretation or application of the Chicago Convention which could not be ettled by negotiation was considered and decided by the Council. If so, then the slamic Republic has the right to appeal to the Court against that decision and is right cannot be limited by consideration of whether or not certain purely rocedural rules were followed to the letter.

4.04 The satisfaction of the requirements of Article 84 is a matter at must be determined objectively in the light of the relevant facts and the clear nguage of this provision. The Islamic Republic will show in Chapter II that the equirements of Article 84 are met in this case. In other words, that a isagreement over the interpretation and application of the Chicago Convention hich could not be settled by negotiation was presented to, considered and ecided on by the Council.

4.05 In Chapter III, the Islamic Republic will show that the nited States' emphasis on the Rules is misplaced, and that even if the Rules were not followed by the Council in its handling of the dispute, this should not act as a bar to the jurisdiction of the Court, for the following reasons:

- The Rules are of a highly flexible, ad hoc nature, and do not at all have the detailed exclusive, comprehensive and mandatory character alleged by the United States. For example, pursuant to Article 32 the Rules can be "varied or their application suspended" with the agreement of the parties when the Council considers that "such action would lead to a more expeditious or effective disposition of the case"[232]. This is effectively what happened in this case;

- The Council's past practice shows that it has handled disputes with considerable flexibility and has in fact never strictly followed the Rules. The fact that the Council has chosen to adopt such a flexible, ad hoc approach, an approach which it also adopted in this case, cannot be used against the Islamic Republic as a bar to the Court's jurisdiction;

- Such Rules were adopted by the Council to govern the Council's own functioning. It is solely the Council that decides how it deals with disputes and a member State of ICAO (especially a State like the Islamic Republic who is not a member of the Council) cannot be held accountable, and thus barred from having recourse to the Court, for the Council's own failure to follow the Rules strictly;

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[232] See, Exhibit 33, p. 12.

- Even if the Rules were not strictly followed by the Council in this case, all of their main procedural requirements were nevertheless met, and for this reason also the Islamic Republic should not be barred from making an appeal to the Court.

4.06 The United States also argues that because the Rules were ot followed this shows that the Council was acting under Article 54 of the onvention and not under Article 84. This argument, which will be addressed in hapter IV, introduces a formalistic division between the Council's functions nder Article 54 and Article 84 which is not justified by a correct reading of the onvention. The United States itself acknowledges that under Article 54 the ouncil may be obliged to address questions concerning the interpretation or pplication of the Treaty. Thus, even if the Council was acting under Article 54 in andling the dispute over the shoot-down of Flight IR 655, a decision rendered by e Council on such a dispute, which clearly concerned the interpretation and pplication of the Convention, would still be appealable as the objective quirements of Article 84 would be met.

4.07 Finally, Chapter V will address the United States' argument at there are policy reasons why the Court should not accept jurisdiction in lation to this appeal from a decision of the Council ICAO. It will be shown that is argument is without foundation and that, to the contrary, all relevant policy nsiderations support a finding of jurisdiction.

CHAPTER I THE COURT'S JURISDICTION DERIVES FROM ARTICLE 84 OF THE CHICAGO CONVENTION

4.08 Article 84 provides as follows:

> "Settlement of disputes
>
> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council. No member of the Council shall vote in the consideration by the Council of any dispute to which it is a party. Any contracting State may, subject to Article 85, appeal from the decision of the Council to an ad hoc arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council."

4.09 The United States submits a highly distorted reading of Article 84. It seeks to limit the appeal to the Court only to proceedings stipulated ab initio as being an "Article 84 proceeding" and pursued in strict conformity to the Rules. The plain meaning of the Convention affords no basis for such a narrow reading. Article 84, which is incorporated in Part IV of the Convention entitled "Final Provisions", and therefore relates to the Convention as a whole, allows appeal from any decision of the Council on any disagreement regarding th Convention's interpretation or application. It says nothing about procedural requirements. As will be shown below, it is Article 84 alone which governs the Court's jurisdiction and the Rules cannot in any way derogate from this jurisdiction.

4.10 Article 84 entrusts the ICAO Council with a right to resolve disputes over the interpretation or application of the Convention subject to appeal to the Court. Essentially the same structure is adopted in the Food and Agriculture Organization, the World Health Organization, and the World

Meteorological Organization, where the plenary organ of each of these organizations has the power to decide questions or disputes concerning the relevant constitutive instruments, subject to appeal to the Court or, in the case of the World Meteorological Organization, an independent arbitrator appointed by the President of the Court[233]. However, in the Chicago Convention the right of decision is given not to the plenary organ of ICAO, the Assembly, but to the Council, which is of limited membership[234].

4.11 Although the Chicago Convention was signed on 7 December 1944, ICAO existed until 1957 - for 13 years - without any rules for the settlement of disputes under Article 84[235]. Thus, signatories to the Convention in 1944 consented to the jurisdiction of the Court on the basis of the provisions of Article 84 alone without this consent being limited in any way by any procedural rules.

4.12 Under Article 84, three conditions are envisaged in order to establish the jurisdiction of the Court. There must be (i) a disagreement between States over the interpretation or application of the Convention; (ii) the disagreement must be one which cannot be settled by negotiation; and (iii) the disagreement must be considered and decided on by the Council on the application of any State concerned in the disagreement. Other than the provision of Article 84 that the application be considered and decided by the Council, no other formal prerequisites are set out for the procedure to be followed by the Council[236].

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[233] Constitution of the Food and Agriculture Organization, Article XVII(1); Constitution of the World Health Organization, Article 75; Convention of the United Meteorological Organization, Article 29. The text of the relevant provisions is given in Exhibit 34.

[234] See, also, Bowett, D.W.: The Law of International Institutions (London, 1975), at p. 134, where this distinction is emphasized. Exhibit 35. This is a significant factor in the present case due to the particular characteristics and composition of the ICAO Council. See, paras. 4.120-4.129, below.

[235] Both Iran and the United States signed the Convention on 7 December 1944. Iran ratified the Convention on 19 April 1950, the United States on 9 August 1946.

4.13 The Islamic Republic sought to show in its Memorial that all of the conditions of Article 84 had been met: as objective questions of fact and law, disagreements between the Parties concerning the interpretation or application of the Convention in connection with the events surrounding the destruction of Flight IR 655 were submitted to the Council; these disagreements could not be settled by negotiation; consequently, they were considered and decided upon by the Council[237].

4.14 The United States' argument is essentially that the Council has established special Rules for handling Article 84 disputes and that the Islamic Republic's alleged failure to follow the Rules should act as a bar to the Court's jurisdiction. This cannot be correct. It is Article 84 alone which governs the jurisdiction of the Court. The Rules cannot have created new substantive condition for an appeal to the Court that did not figure in Article 84. In other words, whatever rule-making power the ICAO Council possesses cannot be employed for the purpose of introducing new substantive requirements for bringing an appeal not found in Article 84 of the Convention.

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[236] The only procedural requirement is that no party involved in the dispute should have a right to vote in any decisions made by the Council. See, para. 4.99, below.

[237] In this regard, contrary to its position with regard to the Montreal Convention and the Treaty of Amity, the United States does not raise in its Preliminary Objections any objection to the effect that the Islamic Republic has failed to show that the disagreement before the Council could not be settled by negotiation. This in itself is a recognition that the dispute over the Chicago Convention, which was fully aired before the ICAO Council, could not be settled by negotiation. Part III has shown conclusively that such negotiations were rendered impossible by the opposing positions of the Parties and the United States' refusal to deal with the Islamic Republic on the matter.

4.15 The subsidiary nature of the Rules is confirmed by two important facts. First, the Rules were adopted by the Council only in 1957 pursuant to Article 54(c) of the Convention which authorizes the Council to "Determine its organization and rules of procedure". It must be stressed that the Rules were therefore adopted not by the plenary organ of ICAO of which all States' parties to the Chicago Convention are members, but rather by a simple vote of the Council. Moreover, the language of Article 54(c) is clear that the Rules were adopted by the Council solely for its benefit and in order to regulate its own procedures.

4.16 Second, these Rules remain flexible and subject to revision. Article 32 of the Rules specifies that they may be varied or suspended with the agreement of the contending parties whenever the Council deems this appropriate for the more expeditious or effective disposition of the case. The Rules may also be amended by the Council even on ad hoc basis under Article 33. This contrasts sharply with the provisions for amending the Chicago Convention itself. Under Article 94(a) of the Convention, any proposed amendment must be approved by a two-thirds vote of the Assembly and then must be ratified by more than two-thirds of the total number of the contracting States. It follows that any attempt to limit the scope of Article 84 of the Convention could only be undertaken in accordance with this constitutional procedure. It would completely undermine the structure and integrity of the Convention if, as the United States seems to contend, substantive provisions of the Convention could be limited by subsidiary provisions adopted by the Council.

4.17 The relation between the Rules and the Convention is analogous to that between the Court's Rules and its Statute. For example, the subsidiary nature of the Rules of Court has been recognized by the Court in considering the provisions of the Statute and the Rules with regard to the right of intervention. Thus, the Court has held that a State's right to intervene in a case is governed by Article 62 of the Statute and must be decided on that basis. The Rules of Court cannot add any additional requirements governing the right to intervene beyond those set out in the Statute. Even though Article 81 of the Rules of Court provides for the furnishing of certain additional information relating to an intervention, the Court has noted that any questions concerning intervention should "be decided on the basis of the Statute and in the light of the particular circumstances of each case[238]". In the same manner, Article 84 of the Convention takes precedence over the Rules, and the question of the Court's jurisdiction must be determined on that basis.

4.18 All these points are no doubt familiar to the Court as they were commented on by several distinguished Judges in the Appeal Relating to the Jurisdiction of the ICAO Council case ("the Appeal case"). As Judge Jiménez de Aréchega explained in his Separate Opinion:

> "15. The question of the competence of the appeal must be determined on the exclusive basis of the treaty provisions establishing the Court's jurisdiction ...
>
> The Rules for the Settlement of Differences adopted by the Council of ICAO cannot have the effect of ousting the Court's jurisdiction, if it exists on the basis of the relevant treaty provisions. A regulation adopted by the organ of first instance cannot add to or detract from the appellate jurisdiction possessed by the Court under provisions which have been agreed to by the contracting States, on whose consent that jurisdiction is grounded.
>
> 16. In any case, it was not the object of these Rules to affect or diminish the Court's jurisdiction, but only to regulate the procedures within the ICAO Council itself[239]."

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[238] Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment, I.C.J. Reports 1981, p. 16, para. 27.

[239] Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 145.

4.19 The same points were made by Judge de Castro in his Separate Opinion:

> "Article 84 of the Convention must be taken as the starting point in order to solve the problem of appeals, and it is starting from that Article that the provisions of the Rules must be studied[240]."

Judge de Castro also noted that -

> "... it cannot be said ... that the Rules of Procedure are statutory rules, having the same force as the constituent instrument of the Council. The Rules for the Settlement of Differences were not adopted by vote of the Parties to the Convention, or of the members of the Assembly; it was the Council which approved them ... It is not the constituent instrument of the Council, but something which the Council itself has produced. The Council reserves to itself powers over the procedure (Art. 28), and Article 33 tells us that 'the present Rules may, at any time, be amended by the Council'[241]."

4.20 The comments of these distinguished Judges point to a fatal flaw in the United States' argument, which places undue emphasis on the Rules and fails to give proper significance to Article 84, which is the statutory basis of he Court's jurisdiction. It will be shown in Chapter II that each of the conditions of Article 84 has been met and that a decision of the ICAO Council appealable to he Court was rendered.

CHAPTER II THE COUNCIL'S HANDLING OF THE DISPUTE ARISING FROM THE SHOOT-DOWN OF FLIGHT IR 655

4.21 In Chapter 2 of its discussion of the Chicago Convention, the United States seeks to show that the dispute submitted by the Islamic Republic was not dealt with by the Council under the procedural rules established by the Council to deal with Article 84 disputes[242]. It contends that -

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[240] Ibid., p. 121.

[241] Ibid., p. 138.

- no proper application was submitted by the Islamic Republic referring to the fact that it was submitting an Article 84 dispute, as required by the Rules;
- no written record of the proceedings exists, as would have been the case if the dispute had been dealt with under the Rules;
- the deliberations of the Council show that it was not acting under the Rules;
- the United States exercised a right of vote which it should not have done had the matter been considered under Article 84;
- no decision of the kind envisaged under the Rules was rendered by the Council; and
- the ICAO's Legal Bureau Director has stated that the Council was acting under Article 54(n).

4.22 These arguments are of a purely formalistic nature and fail to address the essential issue for the purposes of determining whether the Court has jurisdiction - whether or not a disagreement over the interpretation or application of the Chicago Convention was submitted to, considered and decided on by the Council? As the Court observed in the Appeal case, this must be "an objective question of law, the answer to which cannot depend on what occurred before the Council[243]". At best, the United States' arguments, if factually accurate, would only count as evidence as to whether or not objectively such a disagreement had been decided. However, in themselves, they cannot answer the question of whether or not the conditions of Article 84 of the Convention have been met.

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[242] See, U.S. Preliminary Objections, pp. 110, et seq..

[243] Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 70.

4.23 The specific factual contentions made by the United States s to alleged procedural defects in the Council's treatment of the dispute will be ddressed in Chapter III. However, it will become apparent from the following iscussion not only that the Rules were followed in essence but also that to the xtent there was any departure from the Rules this was done with the agreement f the Parties and in recognition of the urgent nature of the dispute and the need r its effective disposition, pursuant to Article 32 of the Rules.

4.24 Even if the Rules were not applied to the letter, it must be ked whether the United States is seriously arguing that the case should be heard by the Council de novo for a second decision to be made in compliance ith the Rules. This would clearly be an absurd suggestion when the Council has alt so fully with the dispute and given its final decision on the issue. It would ake no sense in terms of the good administration of justice and would conflict th one of the established exceptions to the exhaustion of local remedies rule at:

> "There can be no need to resort to the municipal courts ... if the result must be a repetition of a decision already given[244]."

ecisely for these kinds of reasons, in similar circumstances the Court has ruled

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[4] Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76, p. 18. See, also, the Dissenting Opinions of Judges Hudson and Erich at pp. 47-48 and pp. 53-54, respectively.

that it should not allow itself to be hampered by mere defects of form[245].

4.25 In the light of the above comments, this Chapter will show that all the requirements of Article 84 have been met in the present case; that a disagreement over the interpretation or application of the Convention was submitted to the Council (Section A); that the United States recognized that such a disagreement was before the Council (Section B); and that the Council considered and made a decision on this disagreement (Section C). In such circumstances, the Court has jurisdiction, and mere defects of form cannot act as a bar to that jurisdiction.

SECTION A. The Islamic Republic Submitted a Disagreement Over the Intepretation or Application of the Convention to the Council

(i) The Islamic Republic's communications of 3-4 July 1988

4.26 Reflecting the extreme urgency of the matter, the Islamic Republic brought the attention of both the U.N. Security Council and ICAO to he incident immediately after it occurred[246]. To this end, the Islamic Republic ent three telexes to the President of the ICAO Council, two on 3 July 1988, and ne on 4 July 1988. In the first telex, the Islamic Republic referred to the aggressive and criminal attack" by U.S. forces and concluded:

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[245] Thus, in the Nicaragua case the Court found that it "... would make no sense to require Nicaragua now to institute fresh proceedings based on th Treaty, which it would be fully entitled to do. As the Permanent Court observed,

> 'the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the party concerne (Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6, p. 14).'"

Military and Paramilitary Activities in and against Nicaragua (Nicaragua United States of America), Jurisdiction and Admissibility, Judgment, I.C Reports 1984, pp. 428-429.

> "In the interest of safety and security of civil aviation in the region and for the benefit of humanity as a whole I kindly request you to take effective measures in condemning said hostile and criminal acts[247]."

n the second telex, the Islamic Republic requested the President and other nembers of the Council to give the issue their personal attention and invited nem to visit the Persian Gulf and study the incident[248]. Finally, in the third telex ne Islamic Republic requested that the issue be tabled in the Council "as a matter f urgency" -

> "... with the view that an Extraordinary Session of ICAO Assembly be urgently convened to conduct a thorough investigation of all aspects of the catastrophe".

he telex added:

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[46] In his letter of 3 July 1988 to the Secretary-General of the United Nations, Mr. Velayati, the Minister of Foreign Affairs of the Islamic Republic, was explicit in stating that the United States' actions were a "clear violation of all international rules and principles, particularly Articles 1 and 2 of the 1944 Chicago Convention". Exhibit 32 to the Memorial of the Islamic Republic. He also pointed out the serious threat to civil aviation in the region posed by the presence of U.S. forces, stressing that mere verbal expressions of regret would not satisfy the requirements of the situation, and called on the Secretary-General to assist in mobilizing pertinent international bodies to investigate the extent of the U.S. atrocity. It is clear from this letter and from the telexes discussed here that the Islamic Republic was from the very first instant charging the United States with violations of the Chicago Convention.

[47] Exhibit 36.

[48] Ibid.

> "We firmly believe prompt and effective attn. of ICAO is necessary if safe conduct of civil air transportation is to be fostered by ICAO[249]."

4.27 It emerges from these telexes that the Islamic Republic's immediate concerns were fourfold: first, to report the incident as a matter of urgency to the highest organ responsible for international civil aviation; second, to seek a condemnation of the United States' actions by ICAO; third, to request ICAO to take steps to restore the safety of civil aviation in the region; and fourth, to request that a thorough investigation of all aspects of the catastrophe be instituted.

4.28 The telex of 4 July called for an Extraordinary Session of the Assembly. The United States argues that this shows that the Islamic Republic was not acting under Article 84 of the Chicago Convention because the Assembly has no role in Article 84 disputes[250]. Even if relevant, the President of the Council clearly understood that the issue should be heard by the Council. He replied to the Islamic Republic on 4 July 1988 stating that he was consulting members of the Council "concerning the convening of an Extraordinary Session of the Council[251]". However, as all further proceedings were before the Council, and the appropriateness of this was never disputed by the Islamic Republic, this argument is hardly relevant. The important point is that the President recognized the need to deal with the Islamic Republic's request as a matter or urgency and was able to convene the Extraordinary Session of the Council within 9 days.

4.29 The Islamic Republic did not refer either expressly or impliedly to any specific provision of the Chicago Convention in making its submissions to the President of the Council. Thus, it cannot be argued that the Islamic Republic acted under any one provision of the Convention to the exclusion of others. The Islamic Republic relied on the Convention generally, and any and all provisions that were applicable. The Islamic Republic took the only action open to it given the urgency of the matter, as there is no provision for calling an urgent meeting of the Council under either Article 84 of the Convention or the Rules.

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[249] Ibid.

[250] U.S. Preliminary Objections, p. 111.

[251] Exhibit 36.

4.30 Moreover, the Islamic Republic acted as any non-Council member of ICAO would be expected to act. The issue was placed in the hands of the Council, which was requested explicitly and as a matter of urgency to take effective measures. The question of how the issue should be dealt with was left to the Council. This approach was fully consistent with the Convention which obliges the Council to deal appropriately with all matters referred to it by member States and gives the Council full power to apply appropriate procedures[252]. The Islamic Republic was thus entitled to rely on the Council's obligations to take all necessary steps appropriate to its requests.

(ii) The Islamic Republic's Application to the ICAO Council

4.31 The first Extraordinary Session of the Council dealing with the incident opened on 13 July 1988. The Islamic Republic's presentation included a statement of the relevant facts, and drew on a number of factual reports that had been submitted to the Council prior to the Session[253]. It also included a rebuttal of arguments that had appeared in public statements by U.S. officials about the incident - that the Vincennes thought it was being attacked by an F-14, as well as the self-defense argument relating to the alleged attack by the small patrol boats. The Islamic Republic's representative concluded with the following requests:

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[252] The Council's obligations in this regard are discussed further in paras. 4.79-4.87, below.

> "The delegation of the Islamic Republic of Iran requests that the attention of the Council and its deliberation during this Extraordinary Session be directed towards the following aspects of this tragic incident:
>
> 1. Explicit recognition of a delict of international character relating to the breach of international law and legal duties of a Contracting State, Member of ICAO.
>
> 2. Recognition of the fact that the Contracting State shall bear an international responsibility for the criminal actions of its officials, regardless whether they have acted within the limits of their authority or have exceeded it.
>
> 3. Explicit condemnation of the use of weapons against the Iran air passenger aircraft by a member of ICAO, namely the United States.
>
> 4. Formation of an ad hoc commission to conduct an investigation of various legal, technical and other aspects of the shooting down of the Iran air passenger aircraft to be reported, through the Council, to an Extraordinary Session of the Assembly for the purpose of taking necessary action in devising relevant rules, regulations and standards, as well as ensuring their proper and effective implementation for prevention of similar occurrence.
>
> 5. Demand for the immediate termination of present obstacles, restrictions, threats and use of force against the airspace of the Islamic Republic of Iran and the coastal

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[253] On 7 July 1988 the Islamic Republic had submitted a report to the President of the Council about other incidents which had taken place in the Persian Gulf since 1987 and which "... resulted from the violations of international Aviation law and regulations by the United States with respect to safety of the International Civil Aviation". Exhibit 37. The first report contained a detailed statement of incidents where civilian aircraft had been endangered by U.S. forces, a report on the illegal U.S. NOTAMs, and a discussion of the issue of civil-military coordination. It also contained a record of the Islamic Republic's repeated protests to the Council about these actions. Exhibit 38. This report was supplemented by a further report on 12 July 1988, giving details, inter alia, of Flight IR 655, its route, its communications and the number of victims. Exhibit 39.

> States of the Persian Gulf, which endanger the safe and orderly operation of civil air transport in the region[254]".

4.32 These requests revealed that the Islamic Republic's application had a dual nature . On the one hand, there were clear requests for a determination by the ICAO Council of the existence of a breach of "legal duties of a Contracting State, Member of ICAO", recognition that that State should bear responsibility for its illegal actions, and condemnation of the use of force by that State (requests 1, 2 and 3). On the other hand, the Islamic Republic was also concerned with the safety of air navigation in the Persian Gulf (requests 4 and 5). During the course of the proceedings, the Islamic Republic repeatedly emphasized the legal aspects of its application.

4.33 Requests 1, 2 and 3 clearly presented to the Council a charge of violation of the Convention by the United States, and thus a dispute over the interpretation and application of the Convention within the meaning of Article 84. In this respect, the test formulated by the Court in the Appeal case is of the greatest relevance:

> "Consequently the legal issue that has to be determined by the Court really amounts to this, namely whether the dispute ... is one that can be resolved without any interpretation or application of the relevant Treaties at all[255]."

In the Appeal case, the Court held that where there was a charge of breach of treaties, the Council would inevitably be involved in the interpretation and application of the Convention:

> "It was essentially a charge of breaches of the Treaties, - and in order to determine these, the Council would inevitably be obliged

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[254] Draft C-Min. Extraordinary (1988)/1, 13 July 1988, p. 7. Exhibit 40.

[255] Appeal Relating to the Judgment of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 62.

> to interpret and apply the Treaties, and thus to deal with matters unquestionably within its jurisdiction[256]."

The United States has argued this point before the Court itself in the United States Diplomatic and Consular Staff in Tehran case. There it claimed that the mere fact that the United States had charged Iran with violating various provisions of the Treaty of Amity "inevitably requires the interpretation and application of the Treaty[257]". The same criteria apply to the Islamic Republic's submissions to the Council.

(iii) The Islamic Republic maintained its legal claims before the ICAO Council throughout the Council's deliberations

4.34 The next Council meetings dealing with the incident commenced on 5 December 1988 to consider the fact-finding report that had been ordered by the Council (hereinafter referred to as the "ICAO Report"). The floor was taken once more by the representative of the Islamic Republic who expressed the hope that the Council's "deliberation on this issue will result in decisive action against the perpetrator as well as a safeguard for preventing further occurrences of such an incident[258]". In other words the Islamic Republic fully maintained its request that the Council consider both legal claims and safety issues.

4.35 Having expressed his Government's view that in the light of the ICAO Report the United States "should be held responsible and bear the consequences of the tragic incident[259], the representative of the Islamic Republic repeated his Government's legal requests by seeking the following action by the Council:

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[256] Ibid., p. 66.

[257] Oral Argument of Mr. Schwebel, I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran, (USA v. Iran), p. 285. See, also, Conditions of Admission of a State to Membership in The United Nations (Article 4 of Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948, p. 61. This argument is considered in greater detail in Part VI below.

[258] Draft C-Min. 125/12 (Closed), 5 December 1988, p. 8. Exhibit 43.

> "1) Condemnation of the shooting down of IR 655 by the United States military forces in the Persian Gulf.
>
> 2) Explicit recognition of a crime of international character to the breach of international law and legal duties of a Contracting State of ICAO.
>
> 3) Explicit recognition of the responsibilities of the United States Government, and calling for effecting compensation for moral and financial damages.
>
> 4) Demand for the immediate termination of present obstacles, restrictions, threats, and the use of force against civilian aircraft in the region, including Council's appeal to relevant international bodies to demand the withdrawal of all foreign forces from the Persian Gulf[260]."

These statements are as clear-cut a set of submissions of a legal claim based on violations of international law and treaty obligations as any that could be found in any international judicial or arbitral proceedings, and include charges of violations of the Convention and requests for compensation. There could thus be no question that the Council was still faced with a serious legal dispute concerning the interpretation and application of the Convention.

4.36 At the next meeting two days later, it was decided that the ICAO Report commissioned by the ICAO Council should be submitted to the Air Navigation Commission (the "ANC"). A clear picture of how the Islamic Republic understood the proceedings is given in this meeting. After agreement was reached on reference of the ICAO Report to the ANC, the Islamic Republic's representative stressed that the reference to the ANC was purely to deal with the technical and safety aspects of the incident, and that once the ANC had issued its report there would still be the legal issues which had to be decided by the Council[261].

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[259] Ibid., p. 11.

[260] Ibid.

4.37 The Islamic Republic's representative also went on to remind the Council of its obligations under Article 54(j) of the Convention:

> "We also wish to draw the attention of the Council to paragraph (j) of Article 54 of the Chicago Convention, which clearly states that the Council should report to contracting States any infractions of the Convention on International Civil Aviation, as well as any failure to carry out recommendations or determinations of the Council[262]."

The United States alleges that this shows that the Islamic Republic was acting under Article 54(j), not Article 84[263]. To the contrary, the use of the word "also" clearly shows that Article 54(j) was an additional matter for the Council to consider. In any event, as will be shown in Chapter IV below, even if the Council acted under Article 54(j), this does not necessarily preclude an appeal to the Court providing the requirements of Article 84 are still met.

4.38 At the end of this meeting, the President of the Council "gave assurance" that reference of the technical aspects to the ANC "would not preclude detailed consideration, at a later stage, of the full text of the report of the Investigation Team" by the Council (i.e., the ICAO Report)[264]. He also confirmed directly to the Islamic Republic that Articles 54(j) and (k) would be taken into consideration.

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[261] Draft C-Min. 125/13 (Closed), 7 December 1988, p. 19, para. 20. Exhibit 44.

[262] Ibid.

[263] U.S. Preliminary Objections, p. 118.

[264] Draft C-Min. 125/13 (Closed), 7 December 1988, pp. 19-20, para. 22. Exhibit 44.

4.39 The final meetings at which the incident was considered by ie Council were held on 13, 15 and 17 March 1989. As far as the Islamic epublic was concerned, the purpose of these meetings was twofold: to consider ie safety recommendations of the ANC and to deal finally with the legal issues. or this reason, the Islamic Republic once more repeated its requests for relief in lmost identical terms to those set out in paragraph 4.35 above[265]. This confirms iat the Islamic Republic had relied on the President's assurances that these sues were still to be decided by the Council. Reflecting the Islamic Republic's ual concerns, the Council's final decision of 17 March 1989 dealt first with the icident itself, finding that the shoot-down was an accident although there had een errors in identification of the aircraft, and second with the safety issues, by pproving the recommendations in the ANC report[266].

4.40 It is clear from the above that the Islamic Republic had pplied to the Council for a decision on a disagreement involving the iterpretation and application of the Chicago Convention. To this extent, ierefore, one of the main requirements of Article 84 had been met.

ECTION B. The Response of the United States Before the ICAO Council Confirms That a Disagreement Over The Interpretation and Application of the Convention Had Been Submitted to the Council

4.41 The response of the United States to the Islamic Republic's pplication must be considered in the light of the overriding question as to whether a disagreement between the Parties over the interpretation or pplication of the Chicago Convention within the meaning of Article 84 was ubmitted to the Council. In the words of Judge Onyeama in his Separate Opinion in the Appeal case, such a disagreement must exist wherever there is "a

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[65] Draft C-Min. 126/18, 13 March 1989, p. 7. Exhibit 47.

[66] C-Dec 126/20, 17 March 1989, p. 3. Exhibit 50.

difference of opinion as to the meaning of some provision of the Convention, or as to how such a provision should be applied between contracting States in the field of civil aviation[267]".

4.42 Judge Onyeama's view reflects the findings of both the Permanent Court and the present Court as to when a dispute can be said to exist. As the Permanent Court indicated in its Judgment of 30 August 1924 in the *Mavrommatis* case:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons[268]".

4.43 As the record shows, it immediately transpired before the ICAO Council that such a disagreement existed between the Islamic Republic and the United States and that this disagreement had been submitted to the Council for decision.

(i) The United States immediately took issue with the Islamic Republic's position

4.44 At the first meeting of the Council to consider the incident on 13 July 1988 the United States' representative made a detailed presentation of its version of the incident before the ICAO Council. This presentation was introduced in the following terms:

> "In my statement today, I intend to address the following:
>
> First, I will discuss the general background to the incident, includin comment on the continuing conflict in the Persian Gulf;

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[267] *Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972*, p. 87.

[268] *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.

> Second, I will describe the specific situation confronting the captain of the United States ship Vincennes on July 3, 1988, as the facts are known to us at this time; and
>
> Third, I will discuss possible steps that the International Civil Aviation Organization might consider in order to avoid future incidents such as the one we address today. My government wants to work with ICAO on steps that can be taken, as soon as possible, to increase the safety of international civil aviation in the Persian Gulf, a fundamental goal of this Organization and certainly of the United States. We hope this Extraordinary Session of the Council will initiate work to that end[269].

4.45 The United States' approach mirrored the dual nature of he Islamic Republic's claims: in essence it was divided into (i) legal/factual ssertions and (ii) an alleged concern for safety issues. Like the Islamic Republic, he United States made no reference to Article 54 or any other Article of the onvention. However, the United States did make a legal and factual resentation concerning the background situation in the Persian Gulf prior to the ncident, as well as the incident itself, very similar in scope to that made in its reliminary Objections. It specifically rejected the Islamic Republic's contention hat the U.S. naval presence in the Persian Gulf was to blame for the incident[270]. t presented its self-defense argument in detail: alleging that the Vincennes had one to assist neutral vessels that were being "attacked or threatened" by "Iranian unboats"; that the Vincennes misidentified Flight IR 655 as an F-14; and that the captain felt compelled to take action to protect his men and his vessel from what then appeared to be an air attack in support of the Iranian surface ombat"[271]. Finally, it blamed the Islamic Republic for a share of the esponsibility for the incident[272].

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[269] Draft C-Min. Extraordinary (1988)/1, 13 July 1988, pp. 8-9. Exhibit 40.

[270] Ibid., p. 9.

[271] Ibid., pp. 10-11.

[272] Ibid., pp. 11-12.

4.46 In other words, the United States made a detailed rebuttal of the Islamic Republic's contentions as presented to the Council. In and of itself the presentation of these arguments showed that there existed a disagreement as to the United States' performance of its obligations under the Chicago Convention, and thus as to the interpretation and application of the Convention, and that these issues were placed before the Council. The United States also recognized the urgency of the matter and the need for effective and expeditious treatment by the Council of the issues raised.

4.47 The United States indicated that it expected the Council to decide these issues. Giving its agreement to the Islamic Republic's request for a full fact-finding investigation of the incident, the United States concluded its opening presentation with the following statement -

> "Mr. President, this Council has a long history of careful deliberations and of fairness and wisdom in its judgments. My government trusts that its Members, as in past incidents, will reach its conclusions only after all the facts have been received[273]."

The whole presentation by the United States, and in particular the explicit use of its self-defense argument, confirms the judicial nature of the issues facing the Council, and the judicial nature of the role that the Council was expected to adopt.

4.48 The Court will appreciate, therefore, that as from the very outset of the ICAO deliberations there was a disagreement over what each State regarded as the relevant factual and legal issues. Moreover, both States maintained their positions in the subsequent proceedings and the United States did not cease to dispute the claims made by the Islamic Republic.

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[273] Ibid., p. 14 (emphasis added).

4.49 For example, in the last deliberations before the Council, at the meeting on 17 March 1989, the United States sought to distinguish this case from earlier cases involving the shooting down of civilian aircraft. According to the United States, the case of Flight IR 655 was "far different" from these other cases because "[i]n none of the previous cases had there been on-going hostilities or any other circumstances to explain the justification of use of force"[274]. In essence, the United States was arguing that in previous cases there had been no real element of dispute. The shooting of Flight IR 655 was, according to the United States, fundamentally different because the use of force in question was said to be justified, and therefore no violation of the Chicago Convention had taken place.

4.50 Given the specific request of the Islamic Republic for a finding that the United States had violated the Convention, it is clear from the above that the United States recognised that an Article 84 type disagreement existed and that in dealing with this disagreement the Council had jurisdiction to consider the United States' arguments on self-defense and other issues. Such arguments could not be considered without engaging the Council in a judicial capacity relating to the interpretation or application of the Convention.

SECTION C. **The ICAO Council's Approach to the Shoot-down of Flight IR 655**

4.51 It has been shown above that a disagreement between two States over the interpretation and application of the Chicago Convention was presented to the Council. It is now appropriate to consider whether the remaining requirements of Article 84 were fulfilled: that this disagreement was considered and decided by the Council. It should be recalled in this regard that once the Council has a disagreement before it, the obligation is on the Council under Article 84 to decide on that disagreement. Article 84 provides that any such disagreement "shall ... be decided by the Council".

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[274] Draft C-Min 126/20, 17 March 1989, p. 7. Exhibit 49.

(i) The ICAO Council's consideration of the disagreement

4.52 There can be no doubt that the Council "considered" the disagreement with which it was faced. It held several meetings, spanning a period of over 9 months, specifically to deal with the incident. It heard detailed legal and factual argument by both the Islamic Republic and the United States. It also initiated a fact-finding investigation with the express purpose of determining "all relevant facts and technical aspects of the chain of events relating to the flight and destruction of the aircraft"[275]. There is thus a very full written record of these proceedings.

4.53 From the record of the Council's deliberations it is clear that some Council members sought to ignore or even exclude consideration of the legal issues, notwithstanding repeated appeals from the Islamic Republic. For example, the Venezuelan representative stated at the 15 March 1989 meeting that legal issues were "outside of ICAO's purview"[276]. The United Kingdom representative likewise suggested that the "safety of international civil aviation" was the Council's concern, and that the Council should "restrict itself to consideration of the technical issues within its mandate"[277]. In the view of the two leading members of the Council, the United Kingdom and the United States, ICAO was merely "a technical body"[278], endowed with a "specific technical mandate"[279]. Thus, in spite of the Islamic Republic's reminders that there were two aspects to its case, legal and technical[280], and its call for a "just and impartial decision"[281], some Council members seemed more interested in reaching a purely political solution in the "spirit of the rebirth of the Helsinki accord of 1975"[282].

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[275] C-Dec Extraordinary (1988)/2, 14 July 1988, p. 2, para. 6. Exhibit 42.

[276] Draft C-Min. 126/19, 15 March 1989, p. 5, para. 9. Exhibit 48.

[277] Draft C-Min. 125/13 (Closed), 7 December 1988, p. 12, para. 11. Exhibit 44.

[278] Draft C-Min. 126/20, 17 March 1989, p. 6, para. 8. Exhibit 49.

4.54 The United States also alleges, that in his summary of the opening Session of 13 July 1988 of the Council the President failed to recognise the elements of disagreement that were evident between the Islamic Republic and the United States, focussing instead on the "technical aspects"[283]. The language used by the President was as follows.

> "The imperative task for the Council now is to collect all vital information and to reach a complete technical understanding of the chain of events which led to this tragedy. We have to explore every element of our international regulations in the ICAO Standards, Recommended Practices, guidance material and procedures which could prevent the repetition of a similar tragedy, not only in the area where this tragic incident occurred but anywhere else in the world"[284].

4.55 If the United States is correct that the President sought to ignore the Islamic Republic's legal requests, then such statements, as well as the statements of the other Council members who sought to restrict the Council's role to technical questions, were clearly inappropriate where legal issues were before the Council. Under the Convention, the Council has an obligation to consider and deal with such legal issues and the Council cannot escape such obligations by pretending that its role is purely technical and by denying judicial treatment to requests for legal decisions of the kind submitted by the Islamic Republic. If the Council sees its role in this way, or finds it difficult to deal with legal issues, then this denial of justice is an additional reason for the Court to exercise its supervisory jurisdiction in this case[285].

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[279] Ibid., p. 7, para. 9.2.

[280] Draft C-Min. 125/13 (Closed), 7 December 1988, p. 19, para. 20. Exhibit 44.

[281] Draft C-Min. 126/18, 13 March 1989, p. 16, para. 12. Exhibit 47.

[282] Ibid., p. 19, para. 16.

[283] U.S. Preliminary Objections, pp. 117-118.

[284] Draft C-Min. Extraordinary (1988)/1, 13 July 1988, p. 4. Exhibit 40.

4.56 In fact, it appears uncertain under which Article the Council itself thought it was acting. The United States has argued that the Council was acting under Article 54(n), which obliges the Council to "Consider any matter relating to the Convention which any contracting State refers to it"[286]. However, this provision was never once referred to in any of the Council proceedings concerning the incident. Even if the Council thought it was acting under Article 54(n), in referring to "any matter relating to the Convention which any contracting State refers to it" (emphasis added), this provision is clearly broad enough to include disagreements relating to the interpretation or application of the Convention as provided for under Article 84.

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[285] See, in general, Chapter V below on this issue.

[286] U.S. Preliminary Objections, pp. 129-131. The United States relies on a statement by Mr. Milde, the Director of the ICAO Legal Bureau, to this effect, in Mr. Milde's letter to the Deputy Registrar of the Court of 26 May 1989. U.S. Preliminary Objections, Exhibit 24. Mr. Milde's views were not only inaccurate for the reasons explained but it was also totally inappropriate for him to make such gratuitous observations. Quite correctly, the Registrar did not put Mr. Milde's letter in the record of this case, and Dr. Kotaite, the President of the ICAO, subsequently made clear in his oral statement of 9 June 1989 to the Council in Council Meeting 127/10 that any written observations of ICAO will be properly submitted in due course if requested and if appropriate. See, Exhibit 51.

The United States' inclusion of Mr. Milde's letter as an Exhibit to their Preliminary Objections has obliged the Islamic Republic to make this response, without prejudice to its view that Mr. Milde's letter can have no status in these proceedings.

4.57 What is clear is that the Islamic Republic submitted a legal dispute to the Council for decision. This was recognized by the United States at the time and, while some members of the Council may have sought to play down the legal aspects of the dispute, this dispute was nevertheless considered and, as will be shown below, decided on by the Council. In such circumstances, where the requirements of Article 84 of the Convention have been so clearly fulfilled, a right of appeal to the Court exists.

(ii) The Council's decision of 17 March 1989 was of a nature appealable to the Court

4.58 The Council meetings of March 1989 focused on both the legal and the safety aspects of the incident, reflecting the dual concerns that had been expressed during the previous proceedings before the Council. In arguing the legal issues, some members of the Council, such as the Soviet Union and Czechoslovakia, supported the Islamic Republic's request for a condemnation of the United States and proposed appropriate resolutions[287]. Others, however, such as the United Kingdom, stressed that the tragedy was an accident and that no action should therefore be taken against the United States - in other words, that the Islamic Republic's requests should be rejected[288].

4.59 It is true that some members of the Council remained reluctant to deal with the legal dispute in the appropriate manner and instead concentrated on the safety and technical issues. Nevertheless, there is also no doubt that the Council was aware that the legal dispute had to be dealt with, a conclusion that is evidenced by the fact that there were divergent views as to how the Council should decide. For example, recognizing the legal and final nature of the decision to be taken, the Kenyan representative stressed that it should be consistent with previous decisions, taken in accordance with the Council's mandate and not influenced by political considerations"[289].

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[287] See, Draft C-Min. 126/20, 17 March 1989, pp. 4-5. Exhibit 49.

[288] Ibid., p. 6, para. 8. In coming to this conclusion, the majority of the Council was relying on the fact-finding investigation, the primary source of information for which was the U.S. Defense Department Report.

4.60 The legal nature of the decision expected from the Council was explicitly brought to the attention by the Islamic Republic:

> "Since the decision adopted by the Council at this meeting would remain on ICAO's record and would most probably be used as a precedent in future decision-making, the Delegation of the Islamic Republic of Iran believed that such decision should reflect a strong and impartial position against such violations, irrespective of political considerations"[290]."

The Council's decision may not have met all the requirements of the Islamic Republic, but that does not alter the fact that it constituted a binding decision that dealt with the issue before the Council.

4.61 In the end, the Council did not condemn the United States as it had been requested to do, and the Islamic Republic's submissions were not upheld. The decision was nonetheless a legal decision which concluded the Council's consideration of the shoot-down of Flight IR 655. In these circumstances, the United States' assertion that the Court is being asked to act as a court of first instance in the present case is wholly without foundation"[291]. A decision was reached by the Council that can be validly subjected to appeal as it was reached after a comprehensive consideration of the positions of the Parties and of the facts.

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[289] Ibid., pp. 7-8, para. 10.

[290] Ibid., p. 4, para. 5.

[291] U.S. Preliminary Objections, p. 142.

4.62 As for the United States' argument that the decision of the Council was not an Article 84 decision because it did not comply with the "distinctive and well-known requirements for such a decision"[292] - the short answer is that this argument is irrelevant. First, the contention is made in a legal vacuum. The fact is that there are no "distinctive and well-known requirements for Article 84 decisions", as there has never been such a decision except in the dispute over the suspension by India of flights of Pakistani aircraft over Indian territory in 1971 (the "Pakistan/India" case), which was not, of course, a Council decision on the merits[293].

4.63 Moreover, in the Pakistan/India case the Rules were by no means strictly adhered to by the Council and the decision rendered was not in the "correct" form. In particular, statutory voting provisions were ignored and no reasons were given for the decisions. However, when the Court heard India's appeal against the Council's decision, it did not consider the alleged procedural irregularities in any detail as it considered that such irregularities would only confirm the appealability of the decision[294]. In any event, as will be shown in the next Chapter, the Rules were followed in essence in the present case in the Council's rendering of a decision on 17 March 1989[295].

4.64 Second, whatever form the decision was in - whether termed a "decision" or a "resolution" - the Council made a substantive and final decision on the disagreement submitted to it by the Islamic Republic within the meaning of Article 84. Specifically, the Council found that the incident "occurred as a consequence of events and errors in identification of the aircraft which resulted in the accidental destruction of an Iran Air airliner and the loss of 290 lives"[296]. As a result of the finding of "accidental destruction", there was no condemnation of the United States, no finding of violations of the Convention and no ruling that compensation was due[297].

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[292] Ibid., p. 125.

[293] See, Action of the Council, Seventy-fourth Session, 27-29 July 1971. Doc. 8987-C/1004, pp. 42-46. Exhibit 52.

[294] Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, pp. 69-70.

[295] See, paras. 4.88-4.101, below.

4.65 The Islamic Republic does not accept that this decision was correct in fact or law. In this regard, the mere finding that there were "errors" in indentification of the aircraft should have been sufficient to engage the United States' responsibility. As Professor Lowenfeld has stated, this decision was "bad international law", even if it is accepted that the shoot-down was an accident, noting that there should be "liability regardless of fault, so long as the cause is established, as it clearly was in the case of Iran Air 655, as in the case of Korean Air Lines 007"[298].

SECTION D. Conclusion

4.66 All the requirements of Article 84 are met in the present case. A disagreement between two States over the interpretation or application of the Convention was submitted to the Council, considered by it and decided on.

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[296] C-Dec 126/20, 17 March 1989. Exhibit 50.

[297] On the other hand, the safety aspects of the incident were dealt with quite separately by the Council in its endorsement of the findings and safety recommendations of the ANC. No action was taken by the Council on the NOTAMs. Members were informed by the United States that these NOTAMs had been cancelled. See, Draft C-Min. 126/18, 13 March 1989, p. 10, para. 6. Exhibit 47. However, they were subsequently reintroduced by the United States and continue to interfere with and endanger civil aviation in the region. See, Memorial of the Islamic Republic, p. 227, para. 4.28. See, also, the Annex hereto.

[298] Lowenfeld, A.: "Looking Back and Looking Ahead", Agora: Iran Air Fligh 655, 83 Am. J. Int'l. Law (1989), p. 338. Exhibit 53.

4.67 In rendering its decision, the Islamic Republic maintains hat the Council erred on substantive grounds in not properly considering the gal requests before it, and in not condemning the United States for breaches of he Chicago Convention. It is this decision that the Islamic Republic is now ppealing.

HAPTER III THE UNITED STATES' EMPHASIS ON THE SIGNIFICANCE OF THE RULES IS MISPLACED

4.68 The United States accuses the Islamic Republic of ignoring he Rules in its Memorial[299]. While the Islamic Republic's Memorial was not rincipally devoted to the issue of jurisdiction, it must be said that the United tates' discussion of the Chicago Convention gives undue prominence to the ules at the expense of Article 84 of the Convention. It has already been xplained above that it is Article 84 that governs the Court's jurisdiction which annot in any way be limited by an ad hoc set of procedural rules adopted by the ouncil[300]. Additional reasons why the significance of the Rules is exaggerated y the United States will be discussed in this Chapter: first, the Rules themselves e clearly not of the detailed, comprehensive, exclusive or mandatory nature ggested by the United States. Second, the Rules have never been strictly llowed by the Council. Third, any failure to follow the Rules was a failure of the ouncil not of the Islamic Republic. Under the Chicago Convention, the Council as the duty and the power to determine its own rules of procedure. Fourth, the nited States' argument is inaccurate because the essential features of the Rules ere followed by the Council in its handling of the dispute and agreement was ached between the Parties on these procedures in accordance with Article 32 of e Rules.

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[299] U.S. Preliminary Objections, p. 93.

[300] See, paras. 4.15-4.20 above.

SECTION A. The Rules Are Neither Detailed, Comprehensive, Exclusive Nor Mandatory

4.69 The United States argues that the Rules are "detailed, comprehensive, exclusive and mandatory"[301]. This statement is simply not true. Gerald Fitzgerald, former Principal Legal Officer of ICAO, gave a more accurate description of the Rules when, referring to the "relatively primitive decision-making procedure followed by the ICAO Council when acting as a judicial body", he noted that there were "inherent weaknesses in the procedures for the settlement of disputes arising under the Chicago Convention"[302]. Other commentators have stressed the extremely flexible approach embodied in the Rules. Thus, Buergenthal observed that the Council does not act as a "court of law in the strict sense of the word" and pointed out that it "is therefore free to adopt very flexible procedures for dealing with disputes that are referred to it"[303].

4.70 A brief analysis of the Rules bears out these points[304]. Article 1 of the Rules states that they shall govern -

> "Any disagreement between two or more Contracting States relating to the interpretation or application of the Convention on International Civil Aviation ... and its Annexes ...".

However, it should be noted that the obligation to ensure the Rules are followed rests primarily on the Council.

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[301] U.S. Preliminary Objections, p. 93.

[302] Fitzgerald, G.F.: "The Judgment of the International Court of Justice on the Appeal Relating to the Jurisdiction of the ICAO Council", XII The Canadian Yearbook of International Law (1974), pp. 170-171. Exhibit 54

[303] Buergenthal, T.: Law Making in the International Civil Aviation Organisation (Syracuse Univ. Press, 1969), p. 136. Exhibit 55.

[304] See, Exhibit 33.

4.71 The only substantive requirement on a member State is that it should submit a disagreement to the Council for settlement under Article 2. After that initial step, it is for the Council and the Secretary General of ICAO in particular to determine the specific Rules that should be followed and to ensure the correct application of the Rules.

4.72 Article 2 of the Rules sets out the procedural requirements for a State submitting a disagreement to the Council. In particular, the contracting State should "file an application to which shall be attached a memorial". But even this obligation is subject to control by the Secretary General of ICAO. It is he, under Article 3 of the Rules, who is obliged to verify that the application "complies in form with the requirements of Article 2" and "if necessary", he may "require the applicant to supply any deficiencies appearing therein".[305]

4.73 The only further proceedings which are obligatory under the Rules are that the respondent State should be invited by the Secretary General to file a counter-memorial. However, the Council has the option to take a wide range of steps:

- it may invite the Parties to enter into direct negotiations under Article 6(1);
- it may decide to deal with the matter itself or appoint a committee to do the same under Article 6(2);
- it may allow further written pleadings under Article 7;
- it may conduct an investigation under Article 8 which shall be incorporated into a report;

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[305] In earlier cases the Council has been diligent in informing State members of the requirements of the Rules. See, paras. 4.84-4.86 below.

> it may agree to receive oral testimony under Article 9.

After hearing any arguments or evidence by the parties under the procedures outlined above, the Council "shall render its decision" pursuant to Article 15 of the Rules.

4.74 It can be seen from the above that the Council has allowed itself a great deal of freedom in its decision-making process. As noted by Judge de Castro, a further indication of the flexibility of the Rules is that they remain subject to amendment by the Council and may be varied or suspended at any time with the agreement of the parties to a disagreement whenever this would assist the expeditious or effective disposition of the case[306]

4.75 Article 32 of the Rules is of particular significance in this case because even in its first telexes to the Council the Islamic Republic had stressed the urgent nature of the case and the need for effective measures to be taken. The Council also recognized the need for such an approach in convening an Extraordinary Session within 9 days of the incident. The fact that all further procedural steps were taken with the agreement of the Parties shows that the Council's actions remained fully consistent with Article 32.

SECTION B. The Rules Are Not Well Established Within the Practice of the ICAO Council

4.76 The United States gives the impression that the Rules are well-established within the workings of the ICAO Council. In fact, the Rules have never been strictly followed in practice. The Rules were developed during the 1950s in the context of a dispute raised by India against Pakistan concerning a prohibited zone created by Pakistan in India's airspace (the "India/Pakistan" case). Despite the fact that the Rules were not finalized in time for that case, the Council did not consider this to be an impediment to its consideration of the dispute. In putting forward a proposal for action for the Council to take in that dispute, the representative for Canada stated that "he thought that prepared rules were unnecessary at this stage"[307]. This approach was adopted by the Council which accepted, in the words of the representative for Mexico, that there "was nothing unusual in the adoption of ad hoc rules for the settlement of disputes"[308]. Accordingly, the procedural steps taken by the Council and the interested parties were approved, and they were invited to consult with the Council on any further steps in the proceedings[309].

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[306] See, Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 138.

4.77 Although it was a dispute raised after the adoption of the Rules, the Rules were not followed in the 1971 Pakistan/India case. As noted above, improperly formulated propositions were voted on, statutory majority voting provisions were ignored, and no reasons were given for the Council's decision[310]. These irregularities formed one of the bases for the subsequent appeal to the Court[311]. Several commentators have noted the validity of these criticisms[312].

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[307] Council Minutes, Sixteenth Session, 13 May-24 June 1952. Doc. 7291 - C/845, p. 49. Exhibit 56.

[308] Ibid., p. 51.

[309] This dispute was eventually settled without further proceedings before the Council. See, Action of the Council, Sixteenth Session, 13 May-24 June 1952. Doc. 7314 - C/849, pp. 26-29. Exhibit 57.

[310] See, para. 4.63 above.

[311] See, Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, pp. 69-70. The Court found that it was neither appropriate nor necessary for it to go into these procedural irregularities, noting that it was faced with "an objective question of law, the answer to which cannot depend on what occurred before the Council". See, para. 4.22 above.

[312] See, for example, Fitzgerald, G.F., supra, Exhibit 54.

4.78 It is therefore misleading to argue that the Rules provide a comprehensive, well-established structure for handling disputes known to all States. Only one case has ever proceeded beyond the initial stage of an application, and even in that case (Pakistan/India) the Rules were not properly followed.

SECTION C. The Council Has the Obligation To Determine Its Procedures, Not the Applicant State

4.79 The United States' argument is also misguided because it ignores the fact that under the Chicago Convention and the Rules, it is for the Council to determine its own procedures. As explained above, the duties of an ICAO member are limited to submitting to the Council a disagreement over the interpretation or application of the Convention.

4.80 The basis of the Council's duty in this regard starts with Article 54(c) of the Convention which obliges the Council to determine its rules of procedure. However, even under the Rules themselves it is for the Council to determine that a member State's application is in the correct form (under Article 3 of the Rules) and to decide on any further proceedings necessary (under Article 6) when faced with a disagreement submitted by a member State. The Council has great flexibility in this regard. Under Article 32, the Rules may be suspended, varied or even dispensed with at any stage of the proceedings with the agreement of the parties. Article 32 thus indicates the non-mandatory nature of the Rules. In such circumstances, and where, as here, the Parties specifically agreed to the procedural steps taken by the Council, any departure from the Rules cannot act as a bar to the Court's jurisdiction.

4.81 It follows that when the Islamic Republic, a non-Council member, submitted its disagreement to the Council, it left the question of procedure with respect to these submissions entirely up to the Council in recognition of the Council's power and duty to advise on the most appropriate procedure to follow. In dealing with this situation, the Council never insisted on the formal application of any set of rules; instead it relied on the general consensus that a full fact-finding investigation was necessary (which had been requested by the Islamic Republic and was specifically agreed to by the United States); that safety and technical questions should be considered by the ANC (which was again agreed by the Parties); and that the deliberations should take place in formal Council meetings. This approach was supported by nearly all Council members and was reflected in the Council's various procedural decisions.

4.82 On previous occasions, the Council has taken a similar ad hoc approach and has recognized that it has an obligation to advise and consult with the parties on the procedures to be followed. Thus, in the 1952 India/Pakistan case, Council members considered that the formation of the Rules was not a necessary precursor to the commencement of proceedings[313]. In the absence of such Rules, the Council simply followed the Assembly's resolution adopted at its first session in 1947 to the effect that the "procedure to govern the arbitral procedures shall be determined in agreement between the Council and all the interested parties"[314]. In the words of the representative of Canada, the aim was "to work out the next steps along lines that would be mutually satisfactory to [the parties] and to the Council", and to inform the parties "that the Council wished to consult them and would take into account their views on the method of procedure to be adopted"[315].

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[313] See, para. 4.76 above.

[314] Doc. 4411, A1-P/45, 3 June 1947. Exhibit 58.

[315] Council Minutes, Sixteenth Session, 13 May-24 June 1952. Doc. 7291 - C/845, pp. 49 and 52. Exhibit 56.

4.83 Although the Council's discussion in the India/Pakistan case predated the adoption of the Rules, the President of the Council believed that consultation as to procedure was desirable even where procedural rules were in force:

> "The President thought that even where general rules of procedure were being applied, it was common practice and would be useful to give an opportunity for objections to those rules to be considered"[316].

4.84 On the other hand, the Council also recognized that it had an obligation to inform members if it thought that a member had not followed the proper procedures. For example, on receipt of a communication from the Government of Afghanistan, which regarded itself as a party to the India/Pakistan case, the Council took steps to advise Afghanistan that it had not submitted an Article 84 application and of the steps that were necessary in order to submit an application that the Council would regard as valid[317]. Significantly, no similar step was taken by the Council in its consideration of the Flight IR 655 incident. The Council never informed the Islamic Republic that its request for legal remedies was not properly submitted; nor did the Council ever suggest that the Islamic Republic had not followed the correct rules.

4.85 Of even greater relevance is the 1958 dispute between Jordan and the United Arab Republic concerning prohibitions against overflight imposed by each State against the other in which Jordan alleged violations of the Chicago Convention (the "Jordan" case). In response to Jordan's allegations, "the Secretary General ... sent a communication to Jordan indicating the procedure that should be followed, as prescribed in the Rules for the Settlement of

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[316] Ibid., p. 53.

[317] Action of the Council, Sixteenth Session, 13 May-24 June 1952. Doc. 7314 - C/849, p. 29. Exhibit 57.

Differences"[318]. As it was not clear what was the appropriate procedure, it was also agreed that "it was essential to know just what the two States desired of the Council"[319].

4.86 By analogy, if the Council had thought it necessary in the present case, further efforts should have been made to ensure that appropriate procedures were followed. No communications were ever sent, and the Islamic Republic's attention was never drawn to the need for application of the Rules. Nor was there any suggestion from the President that he seek from the Parties "a precise indication of the nature of their requests to the Council" as there had been in the Jordan case[320]. Because the Parties were so evidently in disagreement over the interpretation and application of the Convention, the Council had the obligation to ensure that the correct procedure was followed if it deemed this necessary. In accordance with the Council's obligations under the Convention and the Rules, as well as under its past practice, the Islamic Republic was entitled to rely on the Council to advise it accordingly.

4.87 However, in this case, it was never once suggested by the President of the United States (or any other Council member) that the requests of the Islamic Republic were in any way improper for Council proceedings or that the Council could not render a decision on these requests. It was also never suggested that the Council was unable to deal with the Islamic Republic's requests under the procedures adopted. Instead, the Council relied on the Parties' own agreements in this regard - that a fact-finding investigation should be initiated, that the ANC should make safety recommendations and that the matter should be deliberated in formal Council sessions. As already explained, such a procedure was fully consistent with Article 32 of the Rules as it allowed the expeditious and effective disposition of the case, something that the Islamic Republic had specifically requested, and was adopted with the agreement of the Parties.

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[318] Council Minutes, Thirty-fifth Session, 25 September-17 December 1958, Doc. 7934 - C/912, p. 12. Exhibit 59.

[319] Ibid., p. 11.

[320] Ibid., p. 16.

SECTION D. The Rules Were Followed in Essence

4.88 The United States argues that because there was no proper legal deliberation about the incident and no record of the proceedings, the Court would essentially be hearing the issues as a court of first instance, not as an appellate court. As pointed out above, this argument ignores the fact that the Council conducted extensive deliberations concerning the disagreement, produced a fact-finding report, and rendered a final decision on the matter. There is an extensive record of all these proceedings as can be seen from the exhibits filed by the Parties[321]. There is thus no question of the Court acting as a court of first instance.

4.89 In any event, during the proceedings before the Council, all the main procedural requirements of the Rules, such as there are, were met. In particular, the Islamic Republic's submissions to the Council fulfilled all the conditions of Article 2 of the Rules for filing an application:

- it named the State with which the disagreement existed, the United States (Article 2(a));
- it appointed a special representative to act in the proceedings (Article 2(b));
- it made both written and oral statements of facts and submitted supporting data relating to those facts (Article 2(c) and (d)).

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[321] A full copy of the Hearings of the Council is included in Exhibits 40 through 50 hereto.

- it made a statement of law setting out the United States violations of the Convention and its Annexes and rebutting the United States' defenses to these actions (Article 2(e)); and

- it made clear the relief that it sought (Article 2(f)).

While the Islamic Republic's submissions did not explicitly contain a statement as required under Article 2(g) that negotiations between the parties had taken place but were not successful, this requirement was effectively redundant given the state of relations between the United States and the Islamic Republic, and given the fact that the United States had already made it clear that it accepted no responsibility for the incident. In any event, if the Islamic Republic's application had been deficient in any way, it was for the Secretary General under Article 3 of the Rules to verify this and to request the Islamic Republic to rectify such matters. This was never done, nor did the United States ever make any demand or objection before the Council to the effect that the Rules were not being followed correctly or that the procedures adopted were not appropriate.

4.90 As explained above, the only other procedural requirement under the Rules was that the United States should be invited to reply to the Islamic Republic's application. Again, this was an obligation on the Secretary General under Article 3 of the Rules. While the Secretary General may not formally have done this, the United States effectively presented its detailed rebuttal in oral argument before the Council and in the form of the U.S. Defense Department Report.

4.91 Under the Rules, it was for the Council to decide on the next stage of the proceedings. Faced with the mutual agreement of the Parties on this point, the Council ordered a fact-finding investigation. Again, this step was fully consistent both with Article 32 and Article 8 of the Rules.

4.92 As far as the Islamic Republic was concerned, the investigation was related to the issue of establishing responsibility and thus bore on the legal aspects of the incident. In asking the Council to make its judgments only after all of the facts had been received, the United States also seemed to have understood that this was part of the role of the investigation[322].

4.93 It is clear, however, that Council members saw the purpose and nature of the investigation as being twofold. Some members focussed on the need to investigate the technical and safety aspects. Others took the opposite view arguing that the investigation should be used to determine responsibility for the incident. The Council's final decision commissioning the investigation was wide enough to deal with both aspects of the issue. In adopting a flexible, ad hoc approach to the matter, the Council directed -

> "... the Secretary General to institute an immediate fact-finding investigation to determine all relevant facts and technical aspects of the chain of events relating to the flight and destruction of the aircraft[323]."

Notwithstanding this, the Islamic Republic made clear its understanding that the issue of responsibility remained open, to be determined after the investigation, and that it recognized that the Council's decision represented a compromise of interests determined in part by political considerations[324].

4.94 Significantly, the Council never stated on what basis it was ordering the investigation. The United States now asserts that this investigation was carried out under Article 55(e) of the Convention, and that this proves that the Council was not considering an Article 84 disagreement[325]. However, the nature of the investigation called for was much broader in its scope than provided for by Article 55(e). Indeed, it was more of the nature of an investigation carried out under Article 8 of the Rules, with the organization of the investigation being entrusted to the Secretary General of ICAO[326].

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[322] See, para. 4.47 above.

[323] C-Dec Extraordinary (1988)/2, 14 July 1988. Exhibit 42.

[324] Draft C-Min. Extraordinary (1988)/2, 14 July 1988, pp. 12-13. Exhibit 41.

4.95 Under Article 55(e) of the Convention, the Council may:

> "Investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to it desirable."

The investigation ordered by the Council in this case was not principally concerned with "obstacles to the development of international air navigation". It was an expert fact-finding report to understand the chain of events that led to the shoot-down of a civilian aircraft. As such, the scope of the report was of exactly the kind that might be ordered in international arbitral proceedings in order to determine the factual and technical issues relevant to a dispute.

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[325] U.S. Preliminary Objections, pp. 121-122. The United States points out that Council representatives from Spain and Canada stated their belief that the Council should convene an investigation pursuant to Article 55(e). Of course, whatever the Canadian and Spanish representatives thought should happen does not necessarily reflect what did happen.

[326] Article 8 reads as follows:

"Investigations by Council

(1) The Council may at any time, but after hearing the parties, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion. In such cases it shall define the subject of enquiry or expert opinion and prescribe the procedure to be followed.

(2) A report incorporating the results of the investigation, together with the record of the enquiry and any expert opinion, shall be submitted to the Council in such form, if any, as the Council may have prescribed, and shall be communicated to the parties."

4.96 After consideration of the fact-finding report, no other procedural steps are obligatory under the Rules except the rendering of the decision itself. The United States makes much of the Council decision's failure to follow the "distinctive and well known requirements for Council decisions under Article 84"[327]. However, as already pointed out, the only Council decision under Article 84 to date (in the 1971 Pakistan/India case) did not follow the requirements of Article 15 of the Rules[328].

4.97 In general terms, the decision reached by the ICAO Council on 17 March 1989 met the requirements of Article 15 of the Rules:

- the decision was made after hearing arguments, and after consideration of the fact-finding report as required under Article 15(1);
- the decision was in writing and stated the date on which it was delivered as required under Article 15(2)(i);
- it is clear from the accompanying minutes, which form part of the record of the proceedings, who were the Members of the Council participating and who were the parties to the disagreement, as required by Article 15(2)(ii) and (iii);
- as noted by the United States, the resolution itself "provides an excellent summary of deliberations of the Council throughout its discussion of the Iran Air incident"[329], as required by Article 15(2)(iv); and
- it states the conclusion of the Council, that the shoot-down was an accident, and the Council's reasons for reaching that conclusion that it was "a consequence of events and errors in identification" as required by Article 15(2)(v).

The decision was also taken at a meeting of the Council convened solely for the resolution of the proceedings as required by Article 15(4).

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[327] U.S. Preliminary Objections p. 126.

[328] See, para. 4.63 above.

[329] U.S. Preliminary Objections, p. 128.

4.98 The United States emphasizes the fact that the Council decision of 17 March 1989 was given in the form of a resolution and argues that this shows that the Council was not acting under Article 84[330]. In fact, the Convention makes no distinction between decisions and resolutions, nor does the Council make any such distinction in its ordinary Rules of Procedure[331]. So far as the Council is concerned, it appears that the difference between a decision and a resolution is purely semantic. In the final sessions leading up to the decision of 17 March 1989 there are multiple references to the need for a "decision" to be taken[332]. Due to this practice, and the fact that the U.S. vote had no effect on the final decision, the Islamic Republic did not make an objection on this point. In any event, according to one commentator a "decision" was seen by Council members "as possessing less authority than a formal resolution."[333]

4.99 A final argument raised by the United States in its effort to show that this matter was not dealt with under Article 84 is that it was allowed the right to vote in the Council's decision[334]. There are three comments to make about this argument: first, the United States' vote made no difference to the final decision, which was supported by the majority of Council members; second, the United States should not have been allowed to vote in the Council in this matter whether the Council was acting under Article 84 or any other Article of the

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[330] Ibid., pp. 126-128.

[331] Although the decision of 17 March 1989 was phrased as a resolution, its reference became C-DEC 126/20, i.e., a Council decision. In addition, the Council press release relating to the Council's finding in the dispute made specific reference to a "decision". Exhibit 60. The President of the Council has repeatedly referred to it as a decision. Exhibit 51.

[332] See, for example, the statements of the Kenyan, Cuban, Venezuelan and Panamanian representatives. Draft C-Min. 126/19, 15 March 1989, pp. 5-6. Exhibit 48.

[333] Sochor, E., The Politics of International Aviation (London, 1991), p. 140. Exhibit 61.

[334] U.S. Preliminary Objections, pp. 123-125.

Convention - Article 53 of the Convention prohibits a State from voting in any dispute of any kind in which it is involved; and *third*, in practice, the Council, like the United Nations Security Council, which is governed by a similar clause in Article 27(3) of the Charter, seems not to have required this provision to be strictly enforced[335]. In the light of this practice, and the fact that the U.S. vote had no effect on the final decision, the Islamic Republic did not make an objection. In any event, the fact that this provision was not followed should not act as a bar to jurisdiction, but should furnish the Islamic Republic with additional grounds for appeal.

4.100 To the extent that the decision was in any way deficient as to its form, recourse can always be had to the record of these proceedings. In the *Appeal* case, the Court was not hindered by a similar failing in the Council's decision in the 1971 *Pakistan/India* dispute. As Judge Jiménez de Aréchaga pointed out in his Separate Opinion:

> "The Court had no difficulty in pronouncing on the appeal because of the form of the decision. In the verbatim record of the Council's discussions and decisions, which was before the Court, there was a complete transcript of the reasons and arguments invoked by the Parties and of the explanations of vote and other statements made by the President and those members of the Council who chose to state the grounds for their vote[336]."

While this statement was made with respect to a jurisdictional decision of the Council, it applies equally in this case.

4.101 On the basis of the foregoing, the Islamic Republic submits that it is clear from the record that the substantive conditions of Article 84 were fulfilled and that all the essential requirements of the Rules were met in any event.

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[335] With regard to the Security Council's practice, *see*, the discussion in Cot, J.P. & Pellet, A.: *La Charte des Nations Unies* (Paris, 1985), pp. 508, *et seq.*

[336] *Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972*, p. 155.

CHAPTER IV EVEN IF MADE UNDER ARTICLE 54, DECISIONS OF THE COUNCIL ON THE INTERPRETATION OR APPLICATION OF THE CONVENTION ARE APPEALABLE

4.102 The United States seeks to draw a radical distinction between the Council's functions under Articles 54 and 55 of the Convention, on the one hand, and its quasi-judicial function under Article 84, on the other. Specifically, the United States argues that the Chicago Convention -

> "... envisages two distinct and mutually exclusive methods under which the ICAO Council may examine matters involving the Convention"[157].

On the basis of this distinction, the United States seeks to show that the dispute arising from the shoot-down of Flight IR 655 was dealt with exclusively under Articles 54 and 55 of the Convention, not under Article 84, and that the ICAO Council's decision is therefore not appealable to the Court.

4.103 For reasons already explained, this argument is largely irrelevant because, by its very terms, Article 84 governs any decision on any disagreement over the interpretation or application of the Convention, whatever provision of the Convention the Council may have acted, or thought it was acting, under. Quite apart from this point, it will be shown below that there is no clear-cut distinction between the Council's role under Articles 54 and 55, on the one hand, and Article 84, on the other, and that under Articles 54 and 55 of the Convention, the Council may also be called upon to decide disagreements over the interpretation or application of the Convention - a fact acknowledged by the

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[157] U.S. Preliminary Objections, p. 92.

United States as will be shown in Section C below. Article 84 of the Convention makes no distinction as to why such decisions should not be appealable.

Section A. The Structure of the Chicago Convention Does Not Provide a Clear-Cut Distinction Between Articles 54 and 55 of the Convention, On the One Hand, and Article 84, On The Other

4.104 Articles 54 and 55 of the Convention set out respectively the mandatory and permissive functions of the Council. They provide an exhaustive list which includes the role entrusted to the Council as arbiter in disputes over the interpretation or application of the Convention under Article 84. Pursuant to Article 54(b), the Council is obliged to "discharge the duties and obligations which are laid on it by this Convention" (which, by definition, include the Council's role under Article 84); pursuant to Article 54(n), the Council is obliged to "Consider any matter relating to the Convention which any contracting State refers to it". The Council's duties to receive disputes over the interpretation or application of the Convention and to consider and decide on those disputes thus come within the Council's obligatory functions under Article 54. Far from establishing mutually exclusive methods for dealing with matters, Articles 54 and 84 are complementary.

4.105 It follows that even within the Convention itself there is no distinction of the kind suggested by the United States that decisions rendered by the Council under one set of Articles are appealable to the Court, while decisions under another set of provisions are not. Such a distinction is purely formalistic and does not reflect the intention of the signatories of the Chicago Convention which was clearly that any disagreement over the interpretation or application of the Convention should be capable of being decided by the Council and appealable to the Court.

4.106 The United States' insistence on the importance of form over substance leads it to draw further distinctions between different kinds of matters brought under Articles 54 and 55. At different points in its pleading, the United States argues that the dispute submitted to the Council in this case was dealt with under Articles 54(j), Article 54(k)[338], Article 55(e)[339] or even Article 54(b)[340].

4.107 These distinctions are equally artificial and rest on the same confusion. All of the obligatory functions of the Council are set out in Article 54. These obligations exist concurrently. The Council must address any given situation taking into account both its obligatory functions under Article 54 and its permissive functions under Article 55. For example, the Council must consider its obligations under the Convention pursuant to Article 54(b), must also report infractions of the Convention under Article 54(j), must report any failure to take appropriate action after an infraction of the Convention under Article 54(k), consider an investigation under Article 55(e), and so on.

4.108 It is for the Council to determine what specific steps should be taken in any given case, taking into account the objective demands of the situation. A situation presented to the Council may require the reporting of an infraction of the Convention to the Assembly even when no State has specifically requested it. In this regard, the Council's duties are directed to the safeguarding of the Convention as a whole, and not to any individual State. It is for this reason that obligatory functions are imposed on the Council. It bears repeating that under Articles 54(b) and 54(n) of the Convention, one of these obligatory functions is to decide on disagreements over the interpretation or application of the Convention when such matters are presented to it.

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[338] U.S. Preliminary Objections, p. 119.

[339] Ibid., p. 121.

[340] Ibid., p. 129.

SECTION B. Under Article 54 The Council May Be Called Upon to Make Decisions on the Interpretation or Application of the Convention

4.109 It has already been noted that in the proceedings before the ICAO Council, the Islamic Republic made reference to Article 54(j) of the Convention[341]. The United States suggests that the whole of the Council's treatment of this case may have taken place under this provision[342]. Far from this being a reason for the Court to find that there was no disagreement within the scope of Article 84 decided upon by the Council, it in fact provides alternative grounds for the Court accepting jurisdiction.

4.110 Under Article 54, the Council may be called upon to make decisions on disagreements over the interpretation or application of the Convention. The quasi-judicial nature of issues facing the Council under Article 54(j) has been considered by Professor Bin Cheng, a prominent expert in the field. Professor Cheng writes:

> "The supervisory function of the Council under the first part of Article 54(j) of the Convention, which places upon it a duty to report any infraction of the Convention to the contracting States, including the State in default, must be regarded as essentially judicial in nature, for what the Council is to report under Article 54(j), as well as Article 54(k), is not an alleged infraction, but an infraction. This means an infraction the existence of which has been objectively ascertained by the Council with effect binding on the Organisation and all its members. It would appear that, under general principles of law, before such an infraction can be said to exist, the party or parties concerned must have first been given an opportunity to be heard and a judicial or at least quasi-judicial procedure must have been followed. Moreover, in exercising its function under Article 54(j) and (k), it would appear that both parts of Article 53 must be applied. In other words, the member States

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[341] See, para. 4.37 above.

[342] U.S. Preliminary Objections, p. 119.

> concerned, whether or not members of the Council, should be allowed to take part without vote in the Council's consideration of the alleged infraction[343]."

4.111 It may be said that any claim lodged with the ICAO Council under Article 54(j) by one ICAO member against another alleging that an infraction of the Chicago Convention has been committed is, by its very nature, a dispute relating to the interpretation or application of the Convention. It follows that such a dispute should be settled by the ICAO Council in accordance with legal principles and in a similar way to its treatment of disagreements under Article 84.

4.112 This simply confirms the lack of a clear distinction between the role of the Council under Articles 54 and 55, on the one hand, and Article 84, on the other. The Council may make decisions on contentious issues involving the interpretation or application of the Convention under either Article 54(j) or Article 84. There are no reasons why decisions made under Article 54(j) should be any less appealable to the Court than those made under Article 84[344].

4.113 It is true that in dealing with Article 54(j) matters, the Council has not developed any specific rules to follow in exercising its quasi-judicial functions. Thus, the ICAO Council can decide legal disputes relating to the interpretation or application of the Chicago Convention under Article 54 without reference to the Rules, although it may be seen as a failing of the Council that a similar set of rules has not been drafted and applied to such disputes. This is significant for two reasons. First, it points to the relative unimportance of the Rules generally. Second, to the extent that the Rules were not followed in the dispute over Flight IR 655, this is not relevant if the ICAO Council was exercising its quasi-judicial functions under Article 54.

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[343] Cheng, B., The Law of International Air Transport, (London, 1962), p. 100 (footnotes omitted). Exhibit 62.

[344] The reference in Article 53 precluding ICAO Council members from voting in disputes to which they are parties, which is repeated almost verbatim in Article 84, is also an indication that the Council may be called upon to consider disputes between member States under Articles 54 and 55 and that it is obliged to consider such disputes in a quasi-judicial manner.

SECTION C. The United States Acknowledges that the Provisions of Articles 54 and 55 May Involve the Council Making Decisions Over the Interpretation or Application of the Convention

4.114 In its Preliminary Objections, the United States acknowledges "the breadth and overlapping nature of the functions set forth in Articles 54 and 55" and that "Council actions typically engage several of its enumerated powers under those Articles".[345] Furthermore, the United States concedes that there is no real distinction between the nature of the Council's role under Articles 54 and 55 and its role under Article 84, pointing out :

> "... that in carrying out its multitude of functions under Articles 54 and 55, the Council will be called upon to consider many kinds of contentious issues. Those issues will frequently involve questions concerning, among other things, the interpretation or application of the Chicago Convention".[346]

4.115 This is correct. As explained above, in carrying out its obligation under Article 54(j) to "Report to contracting States any infraction of this Convention ...", it is difficult to see how the Council could avoid making a decision bearing on the interpretation or application of the Convention.

4.116 Notwithstanding these features of the Convention, the United States argues that because the practice of the Council allegedly shows that it routinely decides disagreements over the interpretation or application of the

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[345] U.S. Preliminary Objections, p. 96.

[346] Ibid.

Chicago Convention under Article 54, it follows that "absent a specific invocation of Article 84 procedures by a Contracting State", such decisions cannot be appealable[147]. Neither the premise nor the conclusion of this argument can be accepted. The Council is not routinely asked to decide on disagreements over the interpretation or application of the Convention under Article 54. Such applications are in fact very rarely dealt with, and the quasi-judicial role of the Council under Article 54(j) has rarely been invoked[148].

4.117 In any event, it cannot be argued that the Court's jurisdiction should depend entirely on the invocation of certain procedural rules. This would mean that two exactly similar cases could be heard and decided by the Council, one pursuant to Article 54, the other pursuant to Article 84, but only in the latter case would the decision be appealable. In such a situation, the Court's jurisdiction would depend entirely on the procedures invoked, and not on whether the conditions of Article 84 had been met. This cannot be correct. The Court's jurisdiction is based on the express terms of Article 84 of the Convention itself, and procedural rules cannot limit the extent of this jurisdiction.

4.118 In this regard, the United States' references to the Council's decisions on the KAL 007 incident and on the 1973 shooting down of a Libyan plane by Israeli fighter planes, which the United States argues were dealt with under Article 84 and which were not appealed, miss the point[349]. The fact that no appeals were made may be taken as the relevant parties' acceptance of the Council's decisions, but they cannot be evidence that the decisions were not appealable. The question thus remains open as to whether the requirements of Article 84 were fulfilled in the Council's discussions of these incidents. If they were, then the Council's decision in each case would have been appealable to the Court.

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[147] Ibid., p. 97.

[148] In fact, according to the Repertory Guide to the Convention on International Civil Aviation, Doc. 8900/2 (Second Edition), the Council had, up to 1977, taken action on no matters under Article 54(j) or 54(k). In the light of the United States' allegation that the "ICAO Council has convened over a thousand meetings and rendered many thousands of decisions of various kinds" (U.S. Preliminary Objections, pp. 96-97), it should also be noted that according to the 1977 Repertory Guide it has considered only ten matters under Article 54(n), under which the United States alleges the shoot-down of Flight IR 655 was considered. Exhibit 63.

CHAPTER V **POLICY CONSIDERATIONS WHY THE COURT SHOULD ACCEPT JURISDICTION IN THIS CASE**

4.119 As a final element to its objection, the United States puts forward certain "policy" considerations which it argues should lead the Court to reject jurisdiction in this case. Reduced to its essentials, the United States contends that the Islamic Republic seeks to widen the scope of Article 84 and to extend the supervisory role of the Court over ICAO in a way that would undermine ICAO's authority to deal with disputes and open the floodgates to appeals to the Court from almost any decision of the Council[350]. As will be shown below, this is an unjustified fear and an incorrect characterization of the Islamic Republic's position. It also fails to take into account the far more significant factors that mitigate in favor of the Court's accepting jurisdiction in this case.

SECTION A. **The Limitations of the ICAO Council Justify an Appeal**

4.120 ICAO is based on a constitution that is far from being democratic in several important respects. When ICAO was first conceived by the wartime allies in the closing years of World War II, it was as a convenient administrative grouping of the larger airline States which could be expected to dominate post-war civil passenger transportation. This bias towards the principal air transport States is reflected in the composition of the Council.

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[349] U.S. Preliminary Objections, pp. 98, et seq.

[350] Ibid., pp. 132, et seq.

4.121 Notwithstanding successive constitutional amendments aimed at enlarging the composition of the ICAO Council both quantitatively and qualitatively, membership in the Council during the period from July 1988 to March 1989 was limited to only 33 States. In an organization with a plenary membership which stood at 160 at the end of 1988, this amounted to just slightly more than one-fifth of the total membership. Even more significantly, Article 50 of the Chicago Convention reserves two-thirds of the 33 Council seats to (i) "States of chief importance in air transport" and (ii) States which otherwise "make the largest contribution to the provision of facilities for international civil air navigation." The consideration of ensuring "that all the major geographic areas of the world are represented on the Council" accounts for only the remaining one-third of the 33 seats available. Furthermore, the Assembly's Rules of Procedure allow those States who fail to be elected under the first category to stand under the second category, and those who fail to be elected under the second category to stand under the third[151].

4.122 The effect of these provisions is that the ICAO Council is dominated by a powerful and self-perpetuating minority of States. This is significant in this case, as will be apparent from the above discussion, because States like the United States are able to wield an enormous influence in Council proceedings, as in other international organizations, whereas non-Council members like the Islamic Republic can have little influence. It also means that the vast majority of ICAO member States, which perpetually fail to be elected onto the Council, have little acquaintance with the workings of the Council, let alone any practical experience. This makes it even more difficult for non-Council members to have an effective role in proceedings.

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[151] Standing Rules of Procedure of the Assembly of the International Civil Aviation Organization (4th ed., 1980), Doc 7600/4, Rules 56-57. Exhibit 64.

4.123 ICAO also has a highly dirigiste structure. It places practically all the responsibility for the functioning of the organization on the Council, and leaves the plenary organ, the ICAO Assembly, of which the Islamic Republic is a member, so little to do that it has been decided by a constitutional amendment that it needs to meet no more than once every three years.

4.124 The structure of ICAO makes the right of appeal a particularly important safeguard. First, the right of appeal counter-balances the weighting in the Council in favour of those nations of chief importance in air transport. Second, as the Director of the Legal Bureau of ICAO has noted, even when acting in its judicial capacity the Council is comprised of the representatives of the respective member States, not of individuals acting as judges. Thus, Dr. M. Milde, in a paper written in 1980 when he was Acting Director of ICAO's Legal Bureau, examined the practice of the Council in dealing with cases submitted to it and cited as a "convincing illustration that the Representatives of the Council do not act in 'an impartial and judicial capacity'" the way the Council members acted in the Pakistan/India dispute before the Council in 1971[352]. Dr. Milde concluded that "the Council cannot be considered as a true judicial body", noting that a Council member's "decision may be based on policy considerations ... rather than on strictly legal rules"[353]. This, it has been argued, is an inherent defect in the machinery for dispute settlement under the Chicago Convention - a State is required to act judicially in circumstances where it is practically impossible for the State to divorce itself from the political context[354].

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[352] Milde, M.: "Dispute Settlement in the Framework of the International Civil Aviation Organisation (ICAO)" in Settlement of Space Law Dispute (Köln, 1980), p. 90. Exhibit 65. Dr. Milde was referring in particular to the fact that various Council members wanted to defer making a decision in this dispute, pending receipt of instructions from their governments.

[353] Ibid.

4.125 As noted in the Appeal case, the Council has "limited experience on matters of procedure" and is "composed of experts in other fields han law"[355]. This is a problem of many international organization. As one author notes -

> "... the members of a political or administrative body do not normally have any special legal competence. They are ordinarily diplomats or specialists in the particular subject with which the organization is concerned. Finally, clauses calling for reference to such a body do not usually include the elaborate rules of procedure which govern judicial proceedings, and they do not often provide for the application of stated principles or rules of law.
>
> Such freedom of action is not necessarily conducive to systematic jurisprudence[356]."

Where such organizations have to deal with such fundamental legal issues, as the Council did in this case, such factors must argue in favor of a wide interpretation of the Court's jurisdiction and the exercise of its supervisory role.

4.126 Another feature of ICAO's structure is that certain Council members have sought to restrict the Council's consideration of legal issues and to ocus instead on technical questions, partly in recognition of the Council's deficiencies as a judicial body and partly for political reasons. The technical approach to ICAO's role has been strongly supported by the United States, and was adopted by many Council members during the dispute relating to Flight IR 655. One of the United States' aims in the proceedings dealing with this incident was to divert attention away from the legal and factual disputes in favor of having the Council concentrate on less contentious "technical" issues.

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[354] See, Fitzgerald, G.F., supra, at p. 169. Exhibit 54.

[355] Declaration of Judge Lachs, Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 75.

[356] Sohn, L.B.: Settlement of Disputes Relating to the Interpretation and Application of Treaties, 150 Recueil des Cours (1976), p. 265. Exhibit 66.

4.127 This attitude was typical of the United States' general approach to the ICAO Council in the past. On several occasions the United States has found it expedient to draw attention to the inadequacy of the Council to deal with issues of a contentious or political character, and has attempted to limit the Council's consideration of particular issues to purely technical matters. In the 1973 dispute concerning the shooting down of a Libyan civil aircraft over Sinai, for example, the United States' representative proposed a series of amendments severely limiting the scope of the draft resolution - "with the object of bringing it into closer accord with the proper role of ICAO and of the Council[357]". These amendments were designed to dilute the resolution substantially so as not to condemn Israel and to focus attention instead on the technical issues.

4.128 As noted above, much the same happened in this case where several Council members, including the United States, sought to restrict the scope of the Council's mandate to purely technical issues[358]. Such actions reflected the political weighting of the Council and the fact, as one commentator has noted, that the United States had "let it be known that it would not go along with any text that would invite comparisons with the KAL affair[359]". On the other hand, in the KAL affair, with the political weight of the United States behind it, the Council did not hesitate to make a full-fledged condemnation of the Soviet Union[360].

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[357] Council Minutes, Seventy-ninth Session, 4 June 1973. Doc. 9073 - C/1011, C-Min. 79/4 (Closed), p. 27. Exhibit 67.

[358] See, paras. 4.53-4.54 above.

[359] Sochor, E.: "ICAO and Armed Attacks against Civil Aviation", XLIV International Journal (Winter 1988-89), p. 166. Exhibit 68.

4.129 Such inconsistency is totally inappropriate in the light of the Council's obligation to uphold the principles of international law enshrined in the Chicago Convention and its obligation to act as a quasi-judicial body when called upon to do so. To ensure that these obligations are fulfilled, it is essential that the Court should exercise its supervisory role. According to the Judgment in the Appeal case, it is specifically for "the good functioning of the Organization" that he Chicago Convention "enlist[s] the support of the Court[361]".

SECTION B. An Appeal is Justified Given the Nature of the Proceedings in this Case

4.130 As the Islamic Republic has submitted, the Council was learly faced with disagreements over the interpretation or application of the Chicago Convention within the meaning of Article 84 with respect to the destruction of Flight IR 655. Moreover, a full record was established, a detailed investigative report was prepared, and deliberations took place over some eight ull Council sessions. The procedures adopted by the Council remained within he essential requirement of the Rules, which are themselves of a highly flexible nature and subject to ad hoc amendment by the Council. In particular, in this ase the Council relied on the agreement of the Parties as to procedure in ecognition of the need for an expeditious and effective disposition of the case, consistent with Article 32 of the Rules. The Council also rendered a final decision nding that the "tragic incident ... occurred as a consequence of events and errors

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[60] Such inconsistency in approach has not gone unnoticed. Ibid., p. 158. See, also, Lowenfeld, A., supra, p. 338. Exhibit 53.

[61] Appeal Relating to the Judgment of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 60.

in identification of the aircraft which resulted in the accidental destruction of an Iran Air airlines and the loss of 290 lives[362]". Where there is such an extensive record of the proceedings and a clear decision by the Council, there is no question of the Court being asked to act as a Court of first instance.

4.131 In such circumstances, to the extent certain procedural rules may not have been exactly followed, this should not act as a bar to the Court's jurisdiction which is derived from Article 84 alone. This is especially true given the ad hoc nature of the Rules and the fact that they can be amended by the agreement of the Parties[363].

4.132 To the contrary, to the extent that there were any procedural defects, this should further encourage the Court to exercise its supervisory function on appeal. In the Appeal case, the Court held that procedural irregularities did not need to be considered provided that they did "no prejudice in any fundamental way the requirements of a just procedure[364]". However, several Judges thought the Court should have exercised a greater degree of its supervisory control on this issue and given guidance to the Council precisely because of such irregularities. In his Declaration, for example, Judge Lachs regretted that the Court had not gone into the matter, noting that the consideration of such a matter would surely come within the "supervision by the

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[362] C-Dec 126/20, 17 March 1989. Exhibit 50.

[363] A related problem is that because of the ambiguous and ad hoc nature of the Rules adopted by the Council and because these Rules have scarcely ever been followed in practice, even Council members may be unfamiliar with how the Rules should operate. In the Pakistan/India case there was great confusion among Council members as to voting procedures partly because of their lack of familiarity with the Rules. This problem is even greater for non-Council members.

[364] Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J Reports 1972, p. 69.

Court over those decisions"'referred to in the Court's judgment[365]. Judge Dillard argued that to the extent procedural irregularities led to a miscarriage of justice, this would in and of itself be sufficient to justify an appeal to the Court[366].

4.133 Equally significant is the fact that if there have been procedural irregularities, these are the Council's responsibility and it is the Islamic Republic which has suffered as a result. As already explained in Chapter III, the Council has full control over how it treats a particular matter and the form in which it renders a decision. This constitutes an additional reason why the Court should accept jurisdiction. As Judge Lachs pointed out, "contracting States have he right to expect that the Council will faithfully follow these rules, performing as t does, in such situations, quasi-judicial functions[367]". A fortiori, a State also has he right to expect that the Council will correctly address legal issues addressed to t.

SECTION C. The Operation of ICAO Would Not Be Hampered by the Court's Accepting Jurisdiction Concerning the Dispute over Flight IR 655

4.134 The United States argues that allowing an appeal in this ase would mean that nearly every decision of the Council would be subject to ppeal, and it adds that "Subjecting such decisions to lengthy judicial review could elay crucial aviation safety-related actions of the Council and cripple the peration of ICAO[368]".

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[365] Ibid., p. 75.

[366] Ibid., p. 100.

[367] Ibid., p. 74.

[368] U.S. Preliminary Objections, p. 140.

4.135 This alarmist view has already been presented to the Court without success. In the Appeal case, Pakistan argued that Article 84 specifically referred to "the decision" of the Council, not "any decision", and that its provisions should therefore be construed narrowly lest the dispute-settlement regime of the ICAO be frustrated. This argument was rejected by the Court. It was also commented on by Judge De Castro who, in his Separate Opinion, considered that such an argument was based on a misinterpretation of Article 84:

> "However, a reading of Article 84 without any preconceived view leads us to give it a different meaning. It refers to 'any disagreement' which cannot be settled by negotiation. It does not of course refer to every kind of disagreement which could be resolved by an Order. It refers to disagreements which could be settled by negotiation and which relate to the interpretation or application of the Convention. The number of possible disagreements is limited, and decisions on these do not include any kind of Order whatsoever. They must be important decisions, and decisions of a certain general interest[369]."

When consent has been given by the Convention itself to allow an appeal of any Council decision on any disagreement - particularly a matter as important as the destruction of Flight IR 655 - it is impossible to argue that this consent should be limited in any way for alleged policy reasons. The only way any limitation could be imposed would be by an amendment of the compromissory clause in the Convention.

4.136 The Court has not been swamped by a mass of appeals following its decision to accept jurisdiction in the Appeal case and the dispute-settlement regime of ICAO has not been frustrated in any way. The United States' emotive argument that accepting jurisdiction in this case would "open up for review virtually all actions of the Council that might be said to implicate or involve one or more provisions of the Convention" ignores this fact[370]. The vision of the floodgates opening to appeals has simply not materialized, and there is no reason why it should if the Court accepts jurisdiction here. Fortunately, commercial aircraft flying within their own airspace are not destroyed by the military forces of another State very frequently. The large body of the Council's work does not involve disputes between individual States, and to the extent that here are such disagreements, the vast majority of these will be settled by egotiation. However, when such incidents do occur, and when the ICAO ouncil reaches an erroneous decision, the path must be open for appeal to the ourt, which Article 84 provides.

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[369] Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, pp. 119-120.

4.137 The United States' argument in this context that the Court hould not accept jurisdiction unless the Rules are followed to the letter is also nisplaced. The Council operated for 13 years prior to the adoption of the Rules vithout a single appeal to the Court. By way of comparison, the Food and griculture Organisation, the World Health Organisation, and the World leteorological Organisation, the constitutive instruments of which all contain lauses broadly similar to Article 84, have never formulated rules for the ettlement of disputes as the ICAO Council has done, and yet this has not led to he Court's being inundated by appeals from decisions made by these rganisations relating to the interpretation or application of their respective harters. In fact, the Court has not had one such appeal referred to it. There is herefore nothing to suggest that if the Court accepts jurisdiction in the present ase, it might suddenly become subject to a flood of appeals.

4.138 There is also no reason why the Council's work on safety-elated issues should in any way be affected by an appeal to the Court over a legal

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[70] U.S. Preliminary Objections, p. 140.

dispute. The Council's work on such issues can proceed unaffected by an appeal to the Court, and the Court has always shown itself willing to deal with the legal aspects of disputes that may have a composite character involving political or technical matters more appropriately dealt with in other fora.

4.139 In the same vein, the United States has submitted the further argument that the Court, if it were to entertain an appeal from the ICAO Council's decision, would breach the respect due to a coordinate body of the United Nations. The Court, in its modern jurisprudence, has rejected similar arguments aimed at prohibiting it from acting in any dispute simply because the Security Council, or the General Assembly, has acted or is also acting upon it[371].

4.140 It is true that the legal role of the Council might grow in recognition of the fact that it is obliged to deal with disputes in a more strictly judicial way. However, this cannot be regarded as a negative development. On the contrary, when provided for in their charters, the legal role of international organizations should be carried out in a properly judicial way; this would be strengthened by allowing the right of appeal to the Court.

SECTION D. The Integrity of ICAO Would be Strengthened by Granting a Right of Appeal in this Case

4.141 The dispute before the Council, which concerned the use of force against a civilian aircraft, arguments of self-defense, and issues of State responsibility, clearly involved legal issues of fundamental importance including rinciples enshrined in the U.N. Charter. The Court, as the principal judicial rgan of the United Nations, of which ICAO is a specialized agency, is under an bligation to ensure such principles are respected throughout the United Nations. oreover, the Court's role to ensure respect for international law and to ensure hat this law is applied universally and consistently both within and outside the nited Nations, make this case most appropriate for treatment by the Court[372].

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[371] See, in this regard, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstandin Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16; Aegean Sea Continental Shelf, Interim Protection, Order of 1 September 1976, I.C.J. Reports 1976, p. 3; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, 392.

4.142 These considerations were reflected by several Judges in the ppeal case. For example, in his Separate Opinion, Judge de Castro stated -

> "The question of the appeal to this Court is of undeniable importance, both for the Court and for international organizations. The Court cannot evade its responsibility. For such organizations, it is necessary that there should be a supervisory body, to exercise supervision over complicated legal decisions, and over the interpretation and application of their constitutional and internal rules ...
>
> It is indeed a fact that the administrative and technical nature of the ICAO Council makes it a practical necessity that there should be the widest possibility of appeal to a judicial body such as the Court, with regard to the interpretation of the Convention and of the Agreement[373]."

4.143 Judge de Castro also referred to the Institut de droit ternational's study of the question of "Recours judiciaire contre les décisions organes internationaux" noting that "it is one of the desiderata of the ternational community that the possibility of appeal should be extended to

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[72] See, in this regard, the Separate Opinions of Judge Lachs in the Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie, (Libyan Arab Jamahiriya v. United Kingdom), Order of 14 April 1992. See, also, the President of the Court's recent address to the General Assembly of the United Nations where this aspect of the Court's role is discussed. Report of the International Court of Justice (A/46/4), pp. 15, et seq.. See, also, pp. 19-20 with regard to the Court's role as principal judicial organ of the United Nations.

[73] Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 123.

cover all the decisions of international organizations"[374]. This view is widely shared:

> "... there is one area of international activity where there is a very strong case to be made for the provision of some measure of appeal or review. This is in relation to the exercise of quasi-judicial powers by international organizations[375]".

4.144 As Judge Lachs pointed out, also referring to the Institut's work, an extensive interpretation of the jurisdiction of the Court may be important precisely in order to protect the integrity of the lower forum:

> "Indeed, the same reasons which underlie the necessity of interpreting jurisdictional clauses strictly impel one to adopt an interpretation of provisions for appeal that would lend maximum effect to the safeguards inherent in such provisions. For, as between the 'lower forum' and 'the court of appeal', there exists as it were a see-saw of jurisdictional powers. Hence to apply a restrictive interpretation of rights of appeal - and thus of the powers of the 'court of appeal' - would obviously entail an extensive interpretation of the jurisdictional powers of the 'court of first instance'. This would in fact imply more onerous obligations on the States concerned: something which (as indicated above) international tribunals have continuously endeavoured to avoid. To restrict the rights of States to seek relief from what they deem to be wrongful decisions would to some extent, at least, defeat the very object of the institution of appeals[376]."

There is nothing in the Chicago Convention that implies that the signatories wished to limit the right of appeal. To the contrary, it must be recognised that the breadth of the ICAO's functions, and the role it has to play in disagreements which inevitably have political aspects not foreseen in 1944, make it essential that the right to appeal in Article 84 should not be restrictively construed.

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[374] Ibid..

[375] Lauterpacht, E.: "Aspects of the Administration of International Justice", in Hersch Lauterpacht Memorial Lectures, (Cambridge, 1991), pp. 112-113. Exhibit 69.

[376] Appeal Relating to the Jurisdiction of the ICAO Council, I.C.J. Reports 1972, p. 74.

SECTION E. The United States Has Recognized that this Kind of Incident Should Be Heard By the Court

4.145 It has been shown above that both in this case and in previous cases the United States has sought to restrict the role of ICAO to safety and technical issues. The United States presumably takes the view that ICAO is not an appropriate body to hear such disputes. However, the United States has repeatedly stressed that the Court is an appropriate forum.

4.146 Where the United States has been directly involved with civil aviation incidents in the past it has attempted to refer its disputes directly to the Court and has not sought to seek condemnation from the ICAO Council. Thus, in numerous aerial incidents cases in the 1950s, the United States made applications directly to the Court without seeking to bring the matters before ICAO[377].

4.147 More significantly, in a dispute brought before the ICAO Council by Czechoslovakia concerning problems related to the flight of uncontrolled balloons, and which was considered by the Council under Article 54 of the Convention, the United States made a specific attempt to refer the matter to the Court instead of to the Council[378]. In that case, the Czechoslovakian Government had alleged that the United States had breached Articles 1 and 8 of the Chicago Convention. According to the United States, however, "the ICAO Council was not the proper forum for the consideration of such contentious charges[379]. This is entirely consistent with the United States' attitude to the Council, but of greater significance is the fact that the United States considered that the Court should have jurisdiction over a matter specifically considered by the Council under Article 54. As the U.S. representative stated:

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[377] Aerial Incident of 10 March 1953, Order of 14 March 1956, I.C.J. Reports 1956, p. 6; Aerial Incident of 7 October 1952, Order of 14 March 1956, I.C.J. Reports 1956, p. 9; Aerial Incident of 4 September 1954, Order of 9 December 1958, I.C.J. Reports 1958, p. 158; Aerial Incident of 7 November 1954, Order of 7 October 1959, I.C.J. Reports 1959, p. 276; and Aerial Incident of 27 July 1955 (United States of America v. Bulgaria), Order of 30 May 1960, I.C.J. Reports 1960, p. 146.

[378] Council Minutes, Fortieth Session, 27 April-22 June 1960. Doc. 8078 - C/924, p. 61. Exhibit 70.

> "As a result of a careful and thorough investigation, the United States Government had found that the charges were without foundation, and in a note dated 14 May 1958 had invited the Government of Czechoslovakia to resort to the international forum provided by the International Court of Justice to determine their validity[380]."

4.148 In the face of these precedents, it is inconsistent for the United States now to argue that the Court has no jurisdiction in the present case where the existence of a dispute has crystallized, where a Council decision has been taken and where the requirements of Article 84 have been fulfilled. Given that the United States considered that the Council was not the correct forum for its "contentious" matter with Czechoslovakia and that an Article 54 matter could and should be referred to the Court for determination, it cannot now argue that the present case should not be determined by the Court, regardless of whether it was brought under Article 54 or Article 84.

SECTION F. Conclusions

4.149 In the final analysis, the very nature of this case justifies an appeal. It involves fundamental and complex principles of international law which extend beyond the scope of the Chicago Convention and the expertise of the ICAO Council. In the interests of the Council and the Parties, and in accordance with the Court's role as guardian of international law, it would be proper if the Court exercised its jurisdiction in this case.

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[379] Ibid., p. 63.

[380] Ibid., pp. 62-63.

4.150 In conclusion, the Islamic Republic submits that the jurisdiction of the Court is established under Article 84 of the Chicago Convention, which is the sole basis of the Court's jurisdiction and which is the basis of jurisdiction to which both Parties have consented. There is nothing in the procedures before the Council nor in the policy considerations raised by the United States which can act as a bar to that jurisdiction. To the contrary, these factors support a finding of jurisdiction.

PART V

THE JURISDICTION OF THE COURT ON THE BASIS OF THE MONTREAL CONVENTION

5.01 In its Memorial, the Islamic Republic has already explained why the Court has jurisdiction in the present case under Article 14(1) of the Montreal Convention, pursuant to which a dispute between two or more Contracting States concerning the interpretation or application of the Convention can be submitted to the Court at the request of one of the Parties if the dispute is one "which cannot be settled through negotiations", and "if within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration."

5.02 There undoubtedly exists a dispute between the Islamic Republic and the United States on the question whether - as the Islamic Republic contends - Articles 1, 3 and 10(1) of the Convention are applicable to the actions of the United States in shooting-down Flight IR 655 and in failing to take appropriate measures to prevent the reoccurrence of similar incidents, or whether the Montreal Convention is not relevant at all to the incident, as is asserted by the United States[381]. As the Islamic Republic has demonstrated in Part III above, this dispute, i.e., a disagreement on a point of law and fact, arose between the Parties following the shoot-down of Flight IR 655, and took shape in the discussions between the Parties before the U.N. Security Council and ICAO.

5.03 With respect to the formal requirements of prior negotiations and prior resort to arbitration, the Islamic Republic has already pointed to the reasons why in this case they can be dispensed with, on account of the fact that each contending Party from the outset strongly insisted on its legal view, making any out-of-Court settlement practically impossible[382].

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[381] See, Memorial of the Islamic Republic, pp. 172-178.

5.04 In contrast, the United States' objections to the jurisdiction of the Court under Article 14(1) of the Montreal Convention are based on the following arguments:

- The Islamic Republic cannot rely on the Convention because it has failed to establish that the dispute could not be settled through negotiations; moreover, the Islamic Republic disregarded the additional requirement to seek arbitration of the dispute within a period of six months;

- The Montreal Convention addresses criminal acts committed by individuals against the safety of civil aircraft and was not intended to address actions taken by the armed forces of a State engaged in hostile action;

- The subsequent practice of ICAO with respect to aerial incidents confirms that the Montreal Convention does not apply to State actions against civil aircraft; and

- The Montreal Convention cannot apply to the downing of Flight IR 655 because international armed conflicts, such as that in which the United States and the Islamic Republic were said to be engaged on 3 July 1988, are outside the province of the Convention.

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[382] See, Part III above.

5.05 These arguments will be examined in three successive Chapters below: the first dealing with the conditions of prior negotiation and arbitration, the second with the relevance of the Montreal Convention to the destruction of Flight IR 655 and the question whether actions taken by State agents and, in particular, by members of armed forces are covered by the Montreal Convention, and the third dealing with the question whether the relationship between the United States and the Islamic Republic was that of an armed conflict and, if so, whether such a conflict excludes the application of the Montreal Convention.

CHAPTER I THE CONDITIONS OF PRIOR NEGOTIATION AND ARBITRATION UNDER ARTICLE 14(1) OF THE MONTREAL CONVENTION

5.06 The United States contends that the requirement of prior negotiation and arbitration set forth in Article 14(1) of the Montreal Convention is not a mere formality. Such a requirement represents, in the United States' opinion, a pre-requisite to the jurisdiction of the Court and is an essential step in defining the dispute in order to fix "the points of facts and law over which the parties disagree[383]". Furthermore, if the Court were to underestimate the importance of the conditions indicated in Article 14(1) of the Montreal Convention, the United States argues that this would discourage States from agreeing upon compromissory clauses providing for preliminary "bilateral and low-profile resolution of disputes".

SECTION A. The Condition of Prior Negotiation

5.07 It has already been emphasized in Chapter IV to Part III that the requirement of prior negotiations entails that, before instituting international judicial proceedings, the disagreement between the parties on their international obligations must have clearly emerged in direct discussions, public statements or parliamentary debates.

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[383] U.S. Preliminary Objections, p. 151, citing the Separate Opinion of Judge Ruda in Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America) Jurisdiction and Admissibility, I.C.J. Reports 1984, p. 453.

5.08 It has also been stressed that according to the case law of the Court, once the legal positions of the parties have clearly shown the existence of a legal dispute, diplomatic negotiations need not necessarily be conducted, let alone be protracted and intense. Everything depends on the circumstances of each particular case. In any event, if one of the parties refuses to discuss the matter with the other, or if the parties insist upon their respective views with no possibility of any modification or compromise, it can be reasonably concluded that the dispute cannot be settled by negotiation. If this is the case, the requirement can be regarded as fulfilled, even if no negotiations, or very limited negotiations, have taken place.

5.09 In the light of these considerations, it is entirely justified to conclude that, under the specific circumstances of this case, the requirement of prior negotiations, to the extent it exists, has been satisfied.

(i) Prior to the submission of the case to the Court the dispute had been clearly defined

5.10 The steps taken immediately by the Islamic Republic before the United Nations Security Council and ICAO show that the subject-matter of the dispute raised by the Islamic Republic against the United States was clearly articulated at an early stage. The Islamic Republic requested the United States (i) to acknowledge that the shooting down of Flight IR 655 was contrary to international law, (ii) to recognize its consequent legal responsibility, (iii) to terminate immediately its threats to and interference with civil aviation in the

Persian Gulf and, (iv) to provide compensation for the damages resulting from the shoot-down.

5.11 The dispute was rapidly and clearly defined because of the radically opposed position adopted by the United States when confronted with the precise demands of the Islamic Republic. The United States denied that the attack was in any way contrary to international law, whereas the Islamic Republic insisted that it amounted to an international wrong and considered that the United States' responsibility was an essential element of its claim.

5.12 The dispute was also clearly defined with regard to another point. Apart from unspecific gestures that compensation might be forthcoming, the United States only offered to compensate some of the families of the victims two months after the filing of the Application, and then only ex gratia, i.e., without accepting any responsibility for the attack on Flight IR 655 or recognizing the legitimate interests of the Islamic Republic in the matter. In fact, prior to the filing of the Islamic Republic's Application, the United States constantly denied having any obligation to deal with the Islamic Republic concerning the incident[384]. Moreover, in order to avoid any contact with Iranian authorities or agencies, the United States refused to take into consideration any compensation for the loss of the plane by the Islamic Republic, or for other damages resulting from the attack, and refused to guarantee that similar incidents would not reoccur.

5.13 Finally, while the United States, by excluding any international responsibility, implicitly ruled out not only the applicability of any general rule on State responsibility but also the relevant treaties and conventions on the protection of civil aviation, it is significant that the report of the Islamic Republic submitted to the President of ICAO on 7 July 1988 specifically referred to violations by the United States of "general principles of international law, the Chicago Convention and all its relative Annexes and Standards and Recommended Practices, the Tokyo, Hague and Montreal Conventions[385]".

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[384] See, paras. 3.25-3.44, above. As pointed out at paras. 5.38-5.40 of the Islamic Republic's Memorial, the amounts offered by the United States paled in comparison to the amounts demanded by the United States from Iraq for its attack on the U.S.S. Stark.

5.14 The fact that the Islamic Republic invoked the Montreal Convention in its report of 7 July 1988, while it referred generally to "international law" in later submissions made before ICAO[386], does not imply that the disagreement between the Parties did not relate also to the applicability of the Montreal Convention. Since the views of the two States were so far apart and neither was ready to forgo its contentions, it was not necessary for the Islamic Republic to recite in detail all the international principles and conventions that in its view were relevant to the issue and had been breached by the United States. As discussed in Chapter II below, ICAO had no jurisdiction to address the interpretation or application of the Montreal Convention in any event. Consequently, the reference made to the Montreal Convention in the letter of 7 July 1988 was sufficient to place the United States on notice that a question as to its interpretation or application had arisen[387].

5.15 In this connection, mention should be made of the Court's decision in the jurisdiction phase of the Nicaragua case where the Court held that a dispute can be submitted to it even if during the prior negotiations no mention is made of the treaty on which the applicant State relies to establish the Court's jurisdiction[388]. In that case, the United States had argued that Nicaragua had never raised in negotiations the application of the Treaty of Friendship of 1956 to the factual or legal allegations made in its Application. The Court rejected this objection by noting that:

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[385] See, Exhibit 38, p. 5.

[386] Draft C-Min Extraordinary 1988/1, 13 July 1988, p. 7. Exhibit 40. See, also, Draft C-Min 125/12, 5 December 1988, p. 8. Exhibit 43; and Draft C-Min 126/18, 13 March 1989, p. 7. Exhibit 47.

[387] In fact, prior to the United States' first concrete offer of *ex gratia* compensation, the Islamic Republic had also invoked the Montreal Convention in its Application.

> "[I]t does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do[389]."

5.16 Furthermore, the fact that in the present case the disagreement between the Parties primarily took shape during the course of debates in international fora (the U.N. Security Council and the ICAO Council), and not in bilateral talks, in no way detracts from the fact that the prior negotiation clause could be regarded as complied with to the extent to which it was applicable. As the Court stated in South West Africa, Preliminary Objections, negotiations can take place in international parliamentary bodies in the form of "conference or parliamentary diplomacy" provided, of course, that the contending parties set out their views clearly, it becomes apparent that they are strongly conflicting, and "both sides remain adamant". In such situations direct negotiations between the parties are not necessary because "it is not so much the form of negotiation that matters as the attitude and views of the Parties[390]. Of course, when one State refuses to negotiate with the other, the implications for trying to settle the matter are clear.

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[388] Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America) Jurisdiction and Admissibility, I.C.J. Reports 1984, at p. 428, para. 83.

[389] Ibid., pp. 428-429.

(ii) Prior negotiations did not prove necessary in view of the strong disagreement between the Parties

5.17 As Part III has shown, discussions regarding the dispute took place between the Parties, at least to the minimum extent required by Article 14(1) of the Montreal Convention and the relevant international case law. What must be stressed is that, according to the Court, the character and quality of these discussions needs to be evaluated by taking into account the political relationship existing between them at the time the dispute arose, as well as their views on the matter[391].

5.18 The United States now contends that it made attempts to negotiate, but these proved unsuccessful because of the negative attitude of the Islamic Republic[392]. Apart from the parliamentary-type debates before ICAO and the United Nations, the Islamic Republic denies that the United States ever tried to negotiate the dispute with it arising from the the shoot-down of Flight IR 655 prior to the institution of these proceedings. Any attempts made by the United States to deal with the matter were limited to seeking information regarding some of the victims without tolerating any intervention or "interference" on the part of the Islamic Republic. It was only after the Islamic Republic filed its Application that the United States agreed to meet on the matter. Yet even then, and despite the fact that the United States then knew that the Islamic Republic was alleging a breach of the Montreal Convention, the discussions rapidly reached an impasse due to the radically diverging approaches adopted by the Parties.

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[390] South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 346. See, in this respect, paras. 3.75-3.77, above.

[391] Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Series A, No. 2.

[392] U.S. Preliminary Objections, p. 159.

5.19 Accordingly, there is no basis for arguing that the conditions laid down in Article 14(1) of the Montreal Convention were not satisfied and that the dispute could not be properly submitted to the Court. The attitude of the United States, in refusing to recognize or discuss the unlawful character of the attack, rendered the fulfilment of the conditions set out in Article 14(1) of the Montreal Convention otiose, if not impossible. In these circumstances, it is reasonable to conclude, in the words of Article 14(1), that the dispute was one that "cannot be settled through negotiation".

5.20 The United States cannot now take advantage of the requirement of prior negotiations set forth in Article 14(1) of the Montreal Convention given that the reason why negotiations failed was because the United States refused to deal with the Islamic Republic prior to the bringing of this case or to accept responsibility for the incident[393].

5.21 This is not to say that some channels, such as the U.S. interests section of the Swiss Embassy in Tehran, were not open between the Parties notwithstanding the absence of official diplomatic relations between them[394]. However, the Islamic Republic submits that given the attitude of the United States, which was illustrated by its refusal to respond positively to the Iran

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[393] In its Preliminary Objections, the United States argues that the Montreal Convention is not applicable to the case. Undoubtedly, the United States would have held the same view if the issue had been raised in negotiations, and a fundamental impasse would immediately have thereby been reached.

[394] U.S. Preliminary Objections, pp. 154, et seq.

Insurance Company's offer on 6 February 1989 to send a representative to discuss the matter, these channels could not have been usefully exploited.

5.22 Another possible forum was, in the United States' contention, the Iran-United States Claims Tribunal. However, as Part III, Chapter II(C) has explained, the importance of the role of this Tribunal in providing a possible negotiating forum has been greatly exaggerated in the U.S. Preliminary Objections. While it is true that the Tribunal was functioning at the time of the incident, as it currently is, it is also true that its jurisdiction was strictly limited at that time, as it is now, to the fulfilment of the tasks entrusted to it by the Algiers Declarations of 19 January 1981. The powers of the representatives of the Parties to the Tribunal were accordingly limited to the matters being dealt with by the Tribunal, and did not encompass matters such as the destruction of Flight IR 655 falling outside of the Tribunal's official business.

5.23 Although other fora were also at the disposal of the Parties such as ICAO and the United Nations, serious negotiations were effectively impossible there because of the conflicting positions taken by the Parties, and especially because the United States consistently declared its unwillingness to engage in contact, discussions and negotiations with the Islamic Republic or its agencies over the question of compensation.

SECTION B. The Condition of Prior Arbitration

5.24 The United States also contends that the second condition laid down in Article 14(1) of the Montreal Convention has not been satisfied by the Islamic Republic: arbitration was not officially requested and consequently, the requirement of a six-month period from the date of the request for arbitration has not lapsed.

5.25 It will be shown below that:

- The requirement at issue is not an absolute one: its fulfilment is subject to the condition that both contending parties should show a modicum of political will to cooperate and therefore be ready to agree upon not only the resort to arbitration, but also the practical modalities of such resort and, in particular, the organization of the arbitration;

- In the dispute under consideration, the opposition between the legal position of the Parties was so marked and unbridgeable from the outset that they lacked not only a minimum will to try and settle the disagreement by negotiation, but also, a fortiori, the will to set in motion the complex process of arbitration;

- Given these circumstances, the terms of Article 14(1) of the Montreal Convention do not require that one party to the dispute should perform the mere formality of giving notice to the other party of its intention to resort to a judicial settlement of the dispute by putting forward a "preliminary" request for arbitration and then waiting for the six-month period to elapse;

- Consequently, Article 14(1) of the Montreal Convention does not stand in the way of the Islamic Republic instituting proceedings before the Court with a view to asking it to declare, among other things, that the respondent State has breached the Montreal Convention.

5.26 Before dealing with the specific circumstances of this case, it is fitting to dwell briefly on the purpose and scope of international clauses on prior arbitration. A general, if short, analysis of their role makes it possible to grasp better the reason why, in the circumstances of the present case, Article 14(1) of the Montreal Convention can be regarded as having been satisfied by the Islamic Republic.

(i) The purpose and scope of international clauses requiring prior recourse to arbitration

5.27 As the United States points out, the purpose of the prior arbitration clause is "to avoid escalating a dispute between States to this forum [the Court] before the attempt has been made to resolve it through ... arbiters of their choosing[395]". According to the United States, "[w]ere this Court to brush aside such explicit language, the Court would ultimately serve to discourage States from crafting compromissory clauses in which they believe they are fostering a bilateral, low-profile resolution of disputes[396]".

5.28 Clearly, the clauses at issue are designed to enable the parties to a dispute to avoid resort to adjudication by a permanent and institutionalized body such as the Court by instead opting for a third-party settlement that has the merits of being less conspicuous and solemn and more within the control of the parties (as regards the organization of the procedure and especially the appointment of arbitrators).

5.29 It is however obvious that resort to arbitration presupposes, on the part of both contending parties, a high degree of will to prefer arbitration in lieu of adjudication. That both parties to a dispute must have a strong intention to settle the dispute by arbitration is apparent from the fact that, to set in motion the arbitration process, a host of bilateral steps must be agreed. After one of the parties has requested arbitration and the other has responded favourably, both parties must agree upon the general framework of arbitration, that is the structure of the arbitral tribunal, the rules of procedure and who establishes them, the composition of the tribunal, the applicable law, etc., and then they must cooperate in order to appoint the arbitrators, as well as a chairman if there is not a sole arbitrator, and define their terms of reference.

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[395] U.S. Preliminary Objections, p. 152.

[396] Ibid.

5.30 All these steps perforce require a strong and continuing desire on the part of both parties (i) to eschew formal adjudication; (ii) to bridge their differences, hence to come to some sort of agreement for their settlement; and (iii) to have the dispute solved by an independent arbitral tribunal.

5.31 The difficulties inherent in achieving agreement on all of these points should not be underestimated. Article 14(1) provides absolutely no guidelines for the procedural or structural framework of the arbitration. In this respect, it falls far short of even the minimum guidelines for arbitration provided for in Article 85 of the Chicago Convention. The latter at least stipulates the number of arbitrators and, more importantly, the procedures that the appointing authority (in this case the President of the ICAO Council) will adopt for naming a party arbitrator if one of the parties fails to name an arbitrator within the stipulated time limit, and the Chairman or umpire, if the party arbitrators are unable to agree amongst themselves. Article 14(1) contains no similar provisions designating an appointing authority, and no procedures for the naming of arbitrators.

5.32 Experience has shown that even when the arbitration clause in question designates an appointing authority difficulties can arise. Thus, in the

Interpretation of Peace Treaties case (Second Phase), the Court held that a dispute resolution clause containing such a provision did not apply when one of the parties failed first to appoint its own arbitrator. As the Court noted -

> "by its very nature such a clause must be strictly construed and can be applied only in the case expressly provided for therein. The case envisaged in the Treaties is exclusively that of the failure of the parties to agree upon the selection of a third member and by no means the much more serious case of a complete refusal of co-operation by one of them, taking the form of refusing to appoint its own Commissioner[397]."

5.33 It follows that the will of the contending parties to be ready and disposed to bridge their differences and have them settled by third-party arbitration, while agreeing on all of the elements of the arbitration, is the lynchpin of the clauses under discussion and, indeed, the *sine qua non conditio* of the operation of these clauses. Whenever that will is proved to be lacking, the clauses cannot and should not operate, lest the requirements they lay down become mere formalities, devoid of any practical significance. To develop this point, the two elements of this part of Article 14(1) (the request for arbitration and the six-month period) will be considered separately.

5.34 With respect to the need to submit a request for arbitration, clearly a contesting State may legitimately be required to make such a request only if there is some chance of it being accepted by the other party. Whenever it is apparent from the outset that one of the parties refuses to deal with the other or that their disagreement is so fundamental that it cannot be settled by negotiation but only by resort to an institutionalized judicial body to which either party can unilaterally resort, to continue to insist that one of the parties should perform the formality of making a request for arbitration would be tantamount to introducing into international proceedings formalities which are absolutely alien[398].

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[397] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 221 at p. 227.

5.35 In this connection, it should be recalled that as early as 1925 the Permanent Court stated that it could not "allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned[399]". This fundamental ruling has been recently restated by the Court in the Nicaragua case[400].

5.36 The same holds true for the requirement of the six-month period. Again, this proves to be a mere formality which States are allowed to dispense with in the case of a substantial and overall disagreement between them, and where there is no reasonable prospect that they can reach agreement on the elements of the dispute, much less the organization of an arbitration.

5.37 This point has been cogently made by several members of the Court in the opinions they delivered in the recent Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie[401]. Given the importance of these opinions and their direct relevance to the issue under discussion, it is proper to dwell briefly on the case from which they originate.

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[398] This is not to say that arbitrations cannot be a useful means of dispute resolution. However, when there are so many procedural obstacles to agree to or overcome, and when one of the parties has shown no inclination to discuss the matter in dispute, recourse to the Court should be readily available without having to wait for a six-month time period to elapse.

[399] Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J. Series A, No. 6, p. 14.

[400] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984, p. 429, para. 83.

[401] Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Order of 14 April 1992, I.C.J. Reports 1992, p. 114.

5.38 In its two Orders on the matter handed down on 14 April 1992, the Court did not accept the argument raised by the respondent States for denying the Court's jurisdiction under the Montreal Convention based on the non-expiration of the six-month period provided for in Article 14(1) of that Convention. Although the Court did not take an express position on this point, it seems remarkable at any rate that it did not uphold the respondent States' arguments, as it could have done. The contention could therefore be made that the Court implicitly rejected that argument. Be that as it may, what matters is that three Judges, the Acting President of the Court, Judge Oda, Judge Bedjaoui and Judge Weeramantry, forcefully rejected in their opinions the aforementioned argument as put forward by the respondent States.

5.39 In his declaration appended to the Orders, Judge Oda stated:

> "In the present case, there does not seem to exist any convincing ground for asserting that the Court's jurisdiction is so obviously lacking. The Respondent's argument whereby the Court's jurisdiction is denied through the non-lapse of the six-month period would appear too legalistic, if one were to find that no room remained to negotiate on the organization of arbitration in the face of a categorical denial of the possibility of an arbitration[402]."

5.40 In his dissenting opinion Judge Bedjaoui stated that:

> "There are several reasons why in the present case this requirement does not stand in the way of the Court being seised. It should first be noted that in response to the request for arbitration made by Libya the Permanent Representative of the United Kingdom to the United Nations stated that that request was 'not relevant', since this makes it obvious that the decision by the United Kingdom and the

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[402] Ibid., p. 130.

> United states to bring the matter to the Security Council so as to obtain from it a political solution foreclosed, from the outset, any possibility of an arbitral solution. The request for arbitration therefore appeared to be fundamentally inappropriate and inconsistent with the political measures which the Security Council was expected to take and were later taken. Accordingly arbitration was inherently and as a matter of principle ruled out, no matter how long Libya were to wait. The six-month time-limit was altogether meaningless inasmuch as it was inconsistent with the type of political settlement chosen by the two Respondent States, seeing that they opted for submission of the matter to the Security Council last January[403]."

5.41 A similar stand was taken by Judge Weeramantry in his dissenting opinion. He pointed out, among other things, the following:

> "[W]here a party has in anticipation indicated that it will not consider itself bound by mediation or negotiation, the insistence by that party on a waiting period specified as a prerequisite before the matter is taken to the International Court could defeat the purposes of such a provision [i.e. Article 14(1) of the Montreal Convention] [...]. The question of law before us is this: if, in a hypothetical case, a party refuses negotiation, can such party insist on the six-month period of delay before the matter is brought to this Court? Such insistence can well be a roadblock in the path of a party seeking relief from this Court[404]."

5.42 After quoting approvingly the opinion delivered by Judge Ago in the Nicaragua case, Judge Weeramantry continued:

> "It can be plausibly argued that there is no purpose in allowing a party who has repudiated conciliation to argue for the rejection of an application on grounds of its non-compliance with procedures which it has itself rejected. A period of freedom from conciliatory and judicial processes would thus be given to the party repudiating, leaving it at liberty to pursue other non-conciliatory procedures, while its opponent is required to stand by without help or remedy.
>
> Such a construction of the Article [Article 14(1) mentioned above] fits also within theories of interpretation which emphasize that

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[403] Ibid., p. 146, para. 9 (English translation).

[404] Ibid., p. 161.

treaty provisions must be so interpreted as not to render nugatory their object and purpose[405]."

5.43 As is apparent from the above, the three aforementioned Judges shared the view that to require a party to wait six months before applying o the Court would amount to a meaningless formality whenever it was clear that arbitration had no chance of being instituted. In addition, when either of the parties can unilaterally block the arbitration process by refusing to agree on elements necessary to organize the arbitration (such as the composition of the arbitral tribunal, the place of arbitration, the applicable law, the procedure, etc.), t is inappropriate to require the parties to adhere to the six-month period when it would be futile to do so and when the compromissory clause in question explicitly eaves open the possibility of having ultimate recourse to the Court if the elements of arbitration cannot be agreed on within six months. To hold otherwise would mean depriving Article 14 of its object and purpose, contrary to well-established principles of treaty interpretation.

5.44 The conclusion is therefore warranted that both equirements under discussion (the making of a request for arbitration and the apse of a six-month period before instituting proceedings before the Court) can be legitimately dispensed with any time it becomes apparent that there exist unbridgeable differences between the contending parties and where, onsequently, there is a lack of even the minimum basis for setting in motion the rbitration process.

5.45 International judicial proceedings are hostile to mere procedural formalities that uselessly stand in the way of the proper administration

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[05] Ibid., p. 162. As noted in Part III, several Judges also pointed out that the actions of the Respondent States in refusing to negotiate effectively acted as an anticipatory breach of Article 14(1) of the Convention. See, para. 3.88, above.

of justice; at any rate, such formalities are not suited to international adjudication, as the Court has consistently held. It follows that whenever it can be shown that the fulfilment of the requirements under discussion would amount to a mere formality, these requirements can be dispensed with without this amounting to a breach of the relevant treaty provisions. This is the case for the dispute with which the Court is currently seized.

(ii) The inapplicability of the prior arbitration clause in the case under discussion

5.46 On the basis of the above discussion, it is easy to show why in the instant case the prior arbitration requirement was not applicable as a practical matter. Indeed, the situation is analagous to that presented in the Diplomatic and Consular Staff case where the Court referred to one of the parties' refusal to enter into discussions on the matter as a reason why the other party could understand such refusal as "ruling out, in limine, any question of arriving at an agreement to resort to arbitration[406]. In that case, moreover, the United States had invoked as one of the bases of jurisdiction the 1973 Convention on the Prevention of Crimes Against Internationally Protected Persons. Article 13 of that Convention contained the same kind of temporal arbitration provision as appears in Article 14(1) of the Montreal Convention. Notwithstanding this provision, the United States maintained:

> "This limitation on the court's jurisdiction can have no application in circumstances such as these, where the party in whose favour the six months' rule would operate has by its own policy and conduct made it impossible as a practical matter to have discussions related to the organization of an arbitration, or, indeed, even to communicate a direct formal request for arbitration. It is submittec

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[406] United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 26, para. 49, see, also, Memorial of the Islamic Republic, paras. 2.67-2.68.

> that when such an attitude has been manifested, an application to the Court may be made without regard to the passage of time[407]."

This attitude is in stark contrast to the United States' position here.

5.47 Having reviewed the United States' past conduct, the argument of the United States that the Islamic Republic made no effort to have the dispute submitted to arbitration, did not provide a representative to negotiate the issue and never made the request for arbitration provided for in Article 14(1) of the Montreal Convention can be placed in context. So also can the United States' claim that, by contrast, it never refused to talk with representatives of the slamic Republic about the matter.

5.48 As explained in paragraphs 3.24 to 3.44 above, the description of the facts offered by the United States does not correspond to what actually happened. Prior to the institution of these proceedings, the United States refused to deal with the Government of the Islamic Republic and its agencies as a matter of official policy. Similarly, the United States was unwilling to deal with the representative that the Iranian Insurance Company proposed naming to discuss the matter without receiving assurances that this company was not owned by the Government of the Islamic Republic. As the U.S. note to the ranian Insurance Company dated 16 April 1989 observed (transmitted by the U.S. Interests Section of the Swiss Embassy in Tehran), the United States equired information on the structure and management of the company to etermine "whether it is an entity of the Government of Iran[408]". Yet this

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[07] I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran (USA v. Iran), Memorial of the United States, p. 155. In the present case, the Islamic Republic waited some 11 months after the incident occurred to file its Application whereas in the Diplomatic and Consular Staff case, the United States filed its Application just three weeks after the events that give rise to the dispute.

[08] See, Exhibit 24.

request was simply a smokescreen since the United States already knew that the Iran Insurance Company was a governmental entity.

5.49 Moreover, before the institution of these proceedings, the United States never accepted the right of the Islamic Republic to discuss the legal issues raised by the incident involving Flight IR 655 and the question of compensation arising therefrom. It stands to reason that the firm refusal of the United States to negotiate with the Government of the Islamic Republic and its public agencies, coupled with the United States' view that the Montreal Convention is not applicable to the incident, rendered it inconceivable that agreement could have been reached within six months on all of the elements necessary to put in place an arbitration.

5.50 In the situation described above, and keeping in mind the diametrically opposed approaches and views of the Parties concerning the settlement of the dispute, it is warranted to conclude as in the Diplomatic and Consular Staff case, that no "reasonable probability" existed even for starting serious negotiations and that, consequently, any request for arbitration would have been pointless.

5.51 Consequently, the dispute being one which could not be settled by negotiation, the Islamic Republic was fully entitled to file its Application with the Court, in conformity with Article 14(1) of the Montreal Convention.

CHAPTER II THE MONTREAL CONVENTION IS RELEVANT TO THE FACTS UPON WHICH THE CLAIMS OF THE ISLAMIC REPUBLIC REST

5.52 The United States contends that the Montreal Convention cannot apply to the facts upon which the present dispute rests. It asserts that '[b]oth the terms of the Convention and its history, as well as subsequent practice, emonstrate that the Convention does not address the actions of States against ivil aircraft, and in particular clearly does not apply to the action of a State's rmed forces engaged in armed conflict[409].

5.53 In the opinion of the United States, since the destruction of light IR 655 and the killing of its 290 passengers was perpetrated by U.S. armed orces, it constituted an act attributable to the United States. The United States hen argues, however, that, the term "any person" used in Article 1 of the ontreal Convention refers to individuals and not to "abstract and incorporeal ntities" such as States[410].

5.54 The United States also contends that the inapplicability of he Montreal Convention to this case is further confirmed by the conduct of CAO in condemning episodes of armed attacks brought against civil aviation by he armed forces of a State when ICAO has always referred to the Chicago onvention and not to the Montreal Convention.

5.55 In the Sections that follow, the Islamic Republic will show hat each of these arguments is ill-founded. Before doing so, it is important to ake a preliminary observation regarding the essence of the United States bjections. What is striking about these arguments is that they are all related to e merits of the case - i.e., the actual interpretation or application of the ontreal Convention to the facts of the case. As a result, they do not rise to the vel of genuine preliminary objections within the meaning of Article 79 of the

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[09] U.S. Preliminary Objections, p. 165.

[10] Ibid., p. 167.

Rules of Court, and they certainly do not constitute objections that possess an exclusively preliminary character.

5.56 For example, the United States devotes considerable attention to the phrase "any person" appearing in Article 1 of the Montreal Convention in an effort to show that these words really mean "any private person", not a person engaged in an official or State capacity. Such an argument directly relates to the interpretation or application of the Montreal Convention - an issue for the merits - and not the preliminary question whether the Court has jurisdiction to hear the case.

5.57 The United States proves the point by introducing its argument with the well-known maxim enshrined in the Vienna Convention on the Law of Treaties that a treaty is to be interpreted in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose[411]. The Islamic Republic fully agrees, but notes that the question of the Montreal Convention's interpretation, as well as its application, is precisely a question which the Court has jurisdiction to address at the next (merits) phase of these proceedings under Article 14 (1) of the Convention.

5.58 In addition, the United States' arguments make it clear that a dispute exists between the Parties over the Convention's interpretation or application. While such a dispute cannot be settled during the preliminary phase of the case, its existence demonstrates that the U.S. Preliminary Objections in thi respect cannot be deemed to possess "an exclusively preliminary character". It will therefore be appropriate, in conformity with the Rules, for the Court to orde further proceedings in the case.

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[411] U.S. Preliminary Objections, p. 165.

5.59 Having made these introductory observations, the rest of this Chapter consists of two Sections in which the United States' arguments are rebutted on their merits. Section A will deal with the interpretation of the expression "any person" contained in Article 1 of the Montreal Convention and the scope of the Convention. Section B will rebut the United States' allegations concerning ICAO practice in circumstances analogous to the shooting down of Flight IR 655.

SECTION A. The Expression "Any Person" Used in Article 1 of the Montreal Convention Does not Distinguish between a Private Individual and a State Agent

5.60 The United States asserts that the Montreal Convention lays down obligations to prevent and suppress acts of individuals; the Islamic Republic does not argue anything to the contrary, but also maintains that such individuals can be State agents and can, when engaged in an official capacity, thereby engage the responsibility of the State. If it is true that the Montreal Convention focusses on the prevention and sanctioning of unlawful individual conduct, it cannot be inferred from this that its scope should be limited to the conduct of private individuals. Indeed, the Convention, in imposing upon Contracting States obligations in connection with "unlawful acts against the safety of civil aircraft" does not qualify the individual; in particular, it does not differentiate between individuals acting in their private capacity and those acting qua State agents. The expression "any person" thus includes any individual whether acting in a private or official capacity. If such person is acting in the latter capacity, the responsibility of the State will also necessarily be engaged.

5.61 The following Sub-Sections will show how such a broad meaning of the expression "any person" is confirmed by an analysis of the text of the Montreal Convention (Sub-Section (i)), its preparatory works (Sub-Section (ii)) and by international practice (Sub-Section (iii)).

(i) **The text of the Montreal Convention**

5.62 The literal interpretation of the expression "any person" used in Article 1 of the Montreal Convention cannot lead to a restriction of the scope of that provision. According to the rule of interpretation of international treaties laid down in Article 31 of the Vienna Convention on the Law of Treaties:

> "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose[412]."

5.63 The Court itself has had occasion to apply these rules of interpretation on a number of occasions. For instance, in the case of the Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, the Court held that, in the interpretation and application of the provisions of an international treaty, it is necessary:

> "to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter[413]."

5.64 The plain meaning of the term "any person" does not leave room for any distinction or exclusion: by use of the qualifying word "any", the provisions of the Montreal Convention were purposely kept as broad as possible. As Judge Bedjaoui indicated in his Dissenting Opinion in the Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie:

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[412] It is well established that Article 31 reflects customary international law on this point.

[413] Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, p. 8. The Court reaffirmed this principle in the Case Concerning the Arbitral Award of 21 July 1989 (Guinea Bissau v. Senegal), Judgment, I.C.J. Reports 1991, p. 6 para. 46.

> 'In the first place, Article 1 of the 1971 Montreal Convention removes all doubt on this score to the extent that it refers to 'any person' committing certain 'acts' characterized as 'offences'. This means that the Convention applies very broadly to 'any' person, whether that person acts on his own account or on behalf of any organization or on the instructions of a State'[14].

5.65 The "object and purpose" of the Montreal Convention, as well as all the other international conventions in the field of crimes against the peace and security of mankind, is to make any person who performs acts seriously mpairing certain values accountable. The Convention therefore does not attach any importance to the question whether such acts are carried out by individuals acting in a private capacity or on behalf of a State or other organization or entity.

(ii) The preparatory works

5.66 The above interpretation of the expression "any person" ncluded in Article 1 is borne out by the preparatory works.

5.67 At the Montreal Conference of 1971 the discussion on Article 1 essentially revolved around the classes of offences to be included and he way of mentioning them (whether by a precise enumeration or by a general eference). It is therefore only natural that very little was said as to the categories of persons falling within the purview of that provision.

5.68 However, even a cursory survey of the debates makes it lear that, when referring to the possible authors of offences against the safety of civil aviation, participants in the Conference used a broad terminology, which of necessity included both private individuals and State agents[415].

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[14] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahariya v. United States of America), Order of 14 April 1992, Dissenting Opinion of Judge Bedjaoui, I.C.J. Reports 1992, p. 147, para. 10 (English translation).

5.69 That most of the time delegates referred to both categories of "persons" is borne out by the fact that only in one case did a delegate mention an example which could only be limited to acts of private individuals[416]. It can b deduced from this, *a contrario*, that in all other cases delegates intended to cover acts of both private individuals and State organs.

5.70 The above interpretation is further confirmed by the only instance of a discussion, in the Commission of the Whole, on the question of whether the class of "persons" referred to in Article 1 should also embrace State agents.

5.71 The question was raised by the delegate of Czechoslovakia, who contended that in his view, since the Convention must cover acts of public officials too, it should also provide for the responsibility of the State agency on whose behalf the individual had acted. He stated the following:

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[415] *See*, ICAO, International Conference on Air Law, Montreal, September 1971, Vol. I, Minutes, Doc. 9081-LC/170-1, pp. 21-49. Exhibit 7].

[416] "*The Delegate of Italy* considered, like many other Delegations, that the present drafting of Article 1(1) was not satisfactory. There was a risk, according to that formulation, that acts would be included which had nothing to do with the safety of civil aviation - for example, the case wher two passengers had a quarrel and used a dagger or a knife. In that case it was evident that the armed attack had no consequence with regard to the safety of the aircraft in flight. Nevertheless, if a passenger made an attac on the life of a pilot, even without the use of firearm, the safety of the aircraft would be certainly jeopardized. He therefore suggested a compromise solution to the effect that all acts of violence against the cre by any means whatsoever, should be considered as punishable offences under the terms of the present convention, and that it would be a punishable offence if a person used a firearm or any explosive substance or devices on an aircraft in flight". *Ibid*., p. 30, para. 27

> "[B]efore it proceeded to discuss paragraphs (8) and (9) [of draft Article1], the Commission should decide the scope of the convention as regards the persons committing the offence defined in Article 1. The acts or omissions listed might be perpetrated by an employee of a State or airport authority or, for example, by someone entrusted with the regulation of air navigation safety. In such a case, his Delegation believed that the convention should provide that the authority concerned must also bear responsibility for the act or omission in question"[17]."

5.72 This question was answered, rather unsatisfactorily, by the Secretary of the Commission, and then by the President. The Secretary failed to address the main point raised by the Czechoslovak delegate and only dealt with he question of "omissions". He stated:

> "The Secretariat had intended to draw to the attention of the Drafting Committee the difficulty of interpreting the term 'or omissions' in this Article, and to suggest that the terminology 'an act or a failure to perform a legal duty' might better express what was intended"[18]."

5.73 The President, reacting to this statement, rightly stressed hat it did not provide an answer to the main question raised by Czechoslovakia. He pointed out that he -

> "[F]elt that while the proposed rewording would meet one element of the question raised by the Czechoslovak Delegate it would still leave unanswered the situation of a person falling within the ambit of a State authority. That point might perhaps be covered by means of an exclusion in Article 4"[19]."

n the event, it was decided not to include any further exclusions in Article 4. This implies that persons falling within the ambit of a State authority were still covered by Article 1. In short, there was "no proposal for amendment advanced, and the matter was not pursued further"[420].

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[17] Ibid., p. 46, para. 38.

[18] Ibid.

[19] Ibid.

5.74 It is apparent from this last discussion that no delegate challenged the view of the Czechoslovak Delegate whereby Article 1 also covered acts or omissions of State agents, and on the other hand, no delegate made any proposal designed to address the specific point raised by Czechoslovakia, namely the issue of the additional responsibility of the State on whose behalf the agent was acting. The conclusion is therefore warranted that this discussion further confirms that Article 1 also addresses acts of State organs.

5.75 In considering the scope of the Montreal Convention, it is also important to recall the environment in which it was drafted. As the United States points out[421], the Montreal Convention, together with the 1970 Hague Convention, was drafted in the aftermath of a number of hijackings and other terrorist activities by liberation organizations and other non-self-governing entities that had taken place against civil aircraft.

5.76 These incidents helped spark a debate within the international community as to the definition of "terrorism" and whether it comprised State actions as well as the actions of individuals. As the United State acknowledges in its Preliminary Objections, "individual terrorists might, of cours e covertly directed or supported by States in particular incidents[422]".

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[420] Ibid., para. 39.

[421] U.S. Preliminary Objections, pp. 168-169.

5.77 The possible involvement of States or State organs in errorist activities was subsequently discussed at length, including at the 1984 meeting of the International Law Association. The American scholar, Professor Alfred Rubin summed up the issue at that time as follows -

> "All acts of terrorism are performed by 'people' whether or not purportedly clothed with the authority of a State, just as war crimes can be committed by soldiers as such ... In our opinion, or at least in mine, the legal and political factors underlying that solution to the problem of war criminality apply equally to 'terrorism' and to make the concept of 'State terrorism' both inappropriate and unnecessary[423]".

5.78 The issue of "State terrorism" was also addressed by the oviet delegate, Professor Staroushenko, who noted that:

> "State terrorism opens the way to the use of armed force and thus poses a direct threat to world peace ... Using the armed forces against another State's sovereignty, its territorial integrity and political independence - and being the first to do so - constitutes an act of aggression. Inflicting any 'preventive' blows, without the Security Council sanctioning them, is also a crime. State terrorism is the shortest way to aggression, and very often it is a deliberate preparation for an act of aggression[424]."

5.79 When the Montreal Convention was drafted in 1971, it was uite clear that there was no desire to provoke a lengthy debate over the scope of

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[22] Ibid., pp. 166 and 172. The U.S. State Department has in fact defined terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually intended to influence an audience." U.S. Department of State, Patterns of Global Terrorism: 1988, p. v (1989), cited in Lambert, J.J.: Terrorism and Hostages in International Law, Grotius, Cambridge, 1990, at p. 18. Exhibit 72.

[23] International Law Association, Sixty-first Conference, Paris 1984, p. 167, cited in McWhinney, E.: Aerial Piracy and International Terrorism, 1987, p. 155. Exhibit 73.

[24] Ibid., p. 153.

what might be deemed "State terrorism". The issue was simply too contentious. The drafters of the Convention therefore quite deliberately left the door open for a broad interpretation of Article 1 by referring to offences committed by "any person" without limiting the reference to "any private person" or "any person in his individual capacity"[425]. In so doing, they were well aware that such persons could, in the words of the United States, be directed or supported by States, and thus be acting as State agents capable of engaging State responsibility.

(iii) The international practice bears out the interpretation of Article 1 of the Montreal Convention set out above

5.80 To support the interpretation of the expression "any person" advanced above, reference can be made to the general practice in the field of crimes against the peace and security of mankind. This practice, followed since the end of the First World War, has now crystallized in all the international instruments, binding and non-binding, which deal with such crimes and has also found express acceptance in most domestic legal systems including the U.S. legal system.

5.81 Admittedly, the Montreal Convention does not expressly mention State agents and uses a term more sweeping and synthetic. However, other international instruments which refer to delicta juris gentium also use the generic term "person" without further specification. This is so, for instance, with regard to Resolution 3074-XXVIII adopted by the General Assembly on 3

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[425] As has been noted by one author:

> "... with the political discussion of the United Nations (UN) the concept of international terrorism is used in a very broad sense and as a notion including two different types of violations: not only crimes committed by juridicial or physical persons, but international wrongful acts committed by States as well."

Konstantinov, E.: "International Terrorism and International Law", German Yearbook of International Law, Vol. 31, Duncker & Humblot, Berlin, 1988, P. 291. Exhibit 74.

December 1973, concerning the "Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity". This Resolution refers in paragraph 4 to "persons suspected of having committed such crimes" and to "persons against whom there is evidence that they have committed war crimes and crimes against humanity" (paragraph 5). It is common ground that the term "person" referred to in this Resolution includes both private individuals and State agents.

5.82 This practice shows that the obligation imposed upon States to prevent and repress *delicta juris gentium* and to exercise criminal and possibly civil domestic jurisdiction over their individual authors, exist regardless of the functions that such individuals may carry out within the organisation of a State.

5.83 The importance that crimes against the peace and security of mankind have taken on at the international level is closely bound up with and dependent upon the interest that States show for the protection of certain essential values, such as life, human dignity and the freedom of civil aviation. The criminal acts that impair such values are seen as a threat to international coexistence and cooperation. The individuals perpetrating them are regarded as *hostes humani generis*.

5.84 Furthermore, there is a wide measure of agreement on the idea that the best deterrent against such crimes is represented by the possibility for the greatest number of States to exercise repressive authority, even more so when the crime has been committed by an individual State agent.

5.85 Many treaties and other international legal instruments provide for the duty of States to search for, arrest and bring to trial or, alternatively, extradite to another State concerned all persons responsible for international crimes including war crimes and crimes against peace and humanity.

5.86 It should be emphasized again that this duty is incumbent upon States, regardless of whether the person accused of the crime has acted in his personal capacity or as a State agent. Whenever he has acted as a State agent, a double responsibility however arises: the personal responsibility of the State agent who has perpetrated the crime and the responsibility of the State on whose behalf the individual has acted.

5.87 The personal responsibility operates at the level of domestic legal orders: it is in view of such responsibility that States have the duty to search for, apprehend and prosecute or extradite persons suspected of international crimes. The responsibility of the State operates at the international level: other States are entitled to take to task the State on whose behalf the individual is alleged to have perpetrated an international crime[426].

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[426] See, para. 5.70 above. The same generic term is used by the four Geneva Conventions of 1949, which deal with the criminal responsibility of the members of the armed forces responsible for "grave breaches of the Conventions". See, in particular, Articles 49 of the First Convention, 50 of the Second Convention, 129 of the Third Convention and 146 of the Fourth Convention.

5.88 Clearly, the two classes of responsibility are not mutually exclusive, but rather *cumulative*[427]. That there exists in these cases a dual, cumulative responsibility, although it operates at different levels, is best illustrated by the 1977 Geneva Protocol I to the four Geneva Conventions of 1949. Articles 85-89 of the Protocol provide for the penal repression of "breaches and grave breaches" of the Protocol within the domestic legal system of the High Contracting Parties. However, Article 91 then lays down the principle of State responsibility in the following terms:

> "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

It can be seen, therefore, that the Protocol acts on both the personal (domestic) level and State responsibility (international) level.

5.89 Regard may also be had, by way of illustration, to Article 4 of the Convention for the Prevention and Repression of Genocide of 9 December 1948 which provides, *inter alia*, that:

> "Persons committing genocide or any of other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals."

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[427] On this matter *see*, Oppenheim, L. and Lauterpacht, H.: *International Law*, II, 7th ed., London, 1952, pp. 577-588; Greenspan, M.: *The Modern Law of Warfare*, Berkeley and Los Angeles, 1955, pp. 418-511; Bassiouni, M.C. and Nanda, V.P.: (eds.), *A Treatise on International Criminal Responsibility*, Springfield, Ill, 1973, Vol. I, pp. 103-155 (papers by E.G. Tornaritis, S.P. Sinha and F. Münch), Vol. II, pp. 65-86 (paper by R. Baxter) and 86-96 (paper by O. Triffterer); Röling, B.V.A.: "Aspects of the Criminal Responsibility for Violations of the Laws of War", in Cassese, A. (ed.), *The New Humanitarian Law of Armed Conflict*, I, Napoli, 1979, pp. 199-231; Cassese, A.: *International Law in a Divided World*, Oxford, 1986, pp. 274-276, 290-293; Brownlie, I.: *Principles of Public International Law*, 4th ed., Oxford, 1990, pp. 561-564.

5.90 The same concept is taken up in the International Convention of 30 November 1973 for the Suppression and Punishment of the Crime of Apartheid, the purpose of which is the prevention and punishment of acts of apartheid for which "individuals, members of organizations and institutions and representatives of the State" are responsible (Article 3, paragraph 1).

5.91 Similarly, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968 applies to both "representatives of the State authority" and "private individuals" (Article 2). Attention must be drawn to the fact that when this provision specifically refers to individuals, acting in their private capacity, it uses the term "private individuals". This contrasts with the wording of Article 1 of the Montreal Convention which refers to "any person", and underscores the significance of the fact that no exclusion was provided for in Article 4 of the Convention for the acts of State agents.

5.92 The same approach is reflected in a recent international instrument, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, which entered into force on 1 March 1992. This Convention, which used as its model the Montreal Convention (indeed, even the titles are almost identical) is similar to the Montreal Convention, both as to the content of the criminal acts it bans and as to the obligations on the Contracting States. In Article 3 it provides for offences committed by "any person", as does the corresponding provision contained in Article 1 of the Montreal Convention.

5.93 It should be noted that in the course of the conference which led to the adoption of the Maritime Convention there was a certain amount of discussion as to the inclusion of a reference to unlawful acts committed by persons acting on behalf of a State. In the event, a consensus was reached that there was no need to make express reference to State-sponsored acts since the acts covered by the Convention were expressed to be acts committed by "any person", and this included, as a matter of course, acts of persons sponsored by States[428].

5.94 It must be noted that the Preamble of the Maritime Convention offers a key to the interpretation of the term "any person" used in Article 3, in that it explicitly mentions the U.N. General Assembly Resolution 40/61 of 9 December 1985, notably where it "unequivocally condemns, as criminal, all acts, methods and practices of terrorism wherever and by whomever committed, including those which jeopardise friendly relations among States and their security" (emphasis added).

(iv) Conclusions as to Article 1

5.95 Under international law, references to "persons" are by no means limited to private individuals. For example, in its Restatement (Third) of the Foreign Relations Law of the United States, the American Law Institute states:

> The principal persons under international law are states[429].

5.96 There is no doubt that the drafters of the Montreal Convention were aware that "persons" as such could include States and that they intentionally used the term "any person" in Article 1 so as not to limit its effect. It follows that absent any express restriction in Article 1 indicating that it only applies to private individuals, the reference to "any person" must also include State agents when the acts complained of are carried out by State officials or agents. This, in turn, gives rise to State responsibility.

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[428] See, Plant, G.: "The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation", Int'l Comp. L. Q., Vol. 39 (1990) at p. 33. Exhibit 75.

[429] Restatement (Third) of the Foreign Relations Law of the United States, the American Law Institute, Washington, D.C., 1986, p. 70 (emphasis added). A copy of this page is attached in Exhibit 76. See, also, Brownlie, I.: Principles of Public International Law, Oxford, 1979, p. 436 where the author confirms that States exist as legal "persons" under international law.

5.97 To sum up, it is warranted to hold the view that international legal instruments show that quite apart from the personal responsibility of State agents who can be held responsible at the domestic level, the responsibility of the State to which they belong as organs is also engaged and operates at the interstate level.

5.98 In any event, as has been pointed out at paragraphs 5.55 to 5.58 above, the entire question of the scope of the term "any person" is one for the Court to address at the merits stage of the case since it involves the interpretation or application of the Montreal Convention. This being said, the survey of international practice undertaken above, as well as the interpretation based on the preparatory works, fully bears out and substantiates the plain and ordinary meaning of Article 1 of the Montreal Convention.

SECTION B. **The Practice Followed by ICAO Is Not Germane to the Question Whether the Montreal Convention Is Applicable to the Present Dispute**

5.99 The United States contends that the non-applicability of the Montreal Convention to the present dispute is confirmed by what it calls "subsequent practice" in application of the Convention such as the action of ICAO in not referring to the Convention when dealing with analogous incidents including the 21 February 1973 shooting down of a Libyan civilian airliner by Israeli military aircraft and the 1 September 1983 shoot-down by a Soviet military airplane of a Korean civil airliner. According to the United States, when ICAO condemned or deplored these kind of attacks, it did so solely by invoking the provisions of the Chicago Convention[430]. Had the Montreal Convention been relevant, so the United States contends, it would have been referred to as well.

5.100 This inference is demonstrably incorrect. As is explained below, in the incidents just named, the injured parties only took issue with the application of the Chicago Convention and its Annexes and not with the application of the Montreal Convention. Consequently, ICAO was never called upon to touch upon, much less interpret or apply, the Montreal Convention.

(i) The lack of legal relevance of the "subsequent practice" referred to by the United States

5.101 The first flaw in the United States' argument is that the "practice" referred to has no legal relevance to the interpretation of the Montreal Convention. The United States cites Article 31(3)(b) of the Vienna Convention on the Law of Treaties to support its view that any subsequent practice in the application of the Montreal Convention which establishes the agreement of the parties regarding its interpretation may be taken into account[431]. However, reliance on this article is entirely misplaced because its application depends on the existence of two criteria: (i) that the "subsequent practice" be in application of the treaty being interpreted, and (ii) that such practice establish the agreement of the parties regarding its interpretation. With respect to the "practice" referred to by the United States, it neither has anything to do with the Montreal Convention, nor does it evidence an agreement amongst contracting parties as to its interpretation. Since both elements are prerequisites for Article 31(3)(b) of the Vienna Convention to apply, their absence completely undermines the validity of the United States' argument.

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[430] U.S. Preliminary Objections, pp. 172-181.

[431] Ibid., pp. 172-173 and note 1 to p. 173.

5.102 As will presently be seen, neither the 1973 Israeli shoot-down of the Libyan civil airliner, nor the subsequent Israeli diversion of a Lebanese civil aircraft, nor the 1983 shoot-down of KAL Flight 007 was discussed by ICAO in the context of the Montreal Convention. Since ICAO had no power to address the interpretation or application of the Montreal Convention to those incidents, it is impossible to see how its debates can rise to the level of "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". There was no effort to interpret the Montreal Convention in connection with any of the "practice" cited, and certainly no agreement on its interpretation[432].

5.103 Similarly, the debates before the ICAO in 1973 on whether to amend the Chicago Convention were not directed at interpreting the Montreal Convention, which the participants had no authority to do, but focused instead on modifying the Chicago Convention[433]. Quite simply, the application of the Montreal Convention was not at issue, and there was no agreement amongst the State parties to it regarding its interpretation within the meaning of Article 31(3)(b) of the Vienna Convention. Indeed, there was not even agreement amongst the parties with respect to amending the Chicago Convention.

5.104 It follows that the legal premise on which the United States' entire argument based on "subsequent practice" rests is faulty, and the practice referred to is not really practice within the meaning of the Vienna Convention and has no relevance at all to the interpretation of the Montreal Convention.

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[432] There is further logical defect in the U.S. argument. If, as the United States has maintained, the "subsequent practice" shows that the Montreal Convention did not apply to the incidents in question, how can this practice be relied on as an example of subsequent practice in the application of the Convention as Article 31(3)(b) of the Vienna Convention requires for it to be taken into account?

[433] Unlike Article 94 of the Chicago Convention, which provides for its amendment, there is no similar provision in the Montreal Convention. Moreover, the States that met in 1973 to consider amending the Chicago Convention were not identical to the State parties to the Montreal Convention.

(ii) The discussions in ICAO on other aerial incidents

5.105 Notwithstanding the legal shortcomings to the United States' argument, it can also be shown that the argument is misplaced on the facts. While it is true that in neither the Libyan nor the Korean incident did the discussions before ICAO focus on the Montreal Convention, this is not because the Convention was not relevant to such actions, but because ICAO had no power to consider the application or interpretation of the Montreal Convention to the events in question.

5.106 In this respect, the United States fails to appreciate that there is a fundamental difference between the role that ICAO plays under the Chicago Convention and its role under the Montreal Convention.

5.107 As explained in Part IV, under the Chicago Convention the ICAO Council and its Assembly possess a broad spectrum of functions relating to international civil aviation. To name just a few, the Council has an obligation to "consider any matter relating to the Convention which any contracting State refers to it" (Art. 54(n)) and to report any infraction of the Convention to contracting States as well as any failure to carry out recommendations or determinations of the Council (Art. 54(j)). The Council also has the power to carry out investigations of situations which may appear to present obstacles to the development of international air navigation (Art. 55(e)) and, of particular relevance to the present case, to decide disagreements between two or more contracting States as to the interpretation or application of the Chicago Convention (Article 84). As for the Assembly, it has the power to amend the Chicago Convention under Article 94, as well as other powers under Article 88.

5.108 In contrast, under the Montreal Convention ICAO has a much more limited role. This is entirely natural given that the Montreal Convention essentially provides for a series of State rights and obligations whereas the Chicago Convention is the constituent instrument creating the International Civil Aviation Organization, including the ICAO Council and Assembly, and thus defines ICAO's functions.

5.109 Unlike the Chicago Convention which spells out in considerable detail the functions of the ICAO Assembly and Council, ICAO is only mentioned in two places in the Montreal Convention: Article 9 and Article 13. Article 9 provides that contracting States which establish joint air transport operating organizations or agencies, which operate aircraft subject to international registration, shall designate for each aircraft the State that will have the attributes of the State of registration for purposes of the Montreal Convention. Under Article 9, States are obliged to notify such designations to ICAO. ICAO's only duties in this respect are to communicate these notices to State parties to the Montreal Convention.

5.110 Article 13 of the Montreal Convention provides that every contracting State, in accordance with its national law, shall report to the ICAO Council any relevant information in its possession concerning the circumstances of an offence committed under the Montreal Convention[434]. Notwithstanding this obligation, the Council itself has no power to investigate or rule on such matters. Its function is limited to receiving reports. Moreover, neither the Council nor the Assembly have any power to decide matters relating to the interpretation or application of the Montreal Convention. Failing a negotiated settlement or an agreement to arbitrate, these remain within the exclusive jurisdiction of the Court.

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[434] Significantly, the Islamic Republic did notify ICAO of the United States' violation of the Montreal Convention in shooting down Flight IR 655 when it introduced the matter before ICAO in July 1988. See, Working Paper C-WP/8644 dated 8 July 1988, p. 3, Exhibit 38.

5.111 In the light of the completely different structures of the Chicago and Montreal Conventions, it is hardly surprising that the Montreal Convention was not invoked in front of ICAO during its debates over the Libyan and Korean incidents. Quite simply, ICAO had no authority to discuss or apply the Montreal Convention to the circumstances at issue[435].

5.112 By the same token, when the United States refers in its Preliminary Objections to the fact that investigations were commissioned by ICAO in both the Libyan and Korean incidents, this simply highlights the fact that ICAO could only act in this way under the Chicago Convention; it had no power to order such investigations under the Montreal Convention. As will be seen in the next section, it was precisely because the ICAO Council lacked the power to deal with matters falling under the Montreal Convention that subsequent efforts were made to amend the Chicago Convention to incorporate elements from the former into the latter.

5.113 It follows that the United States' argument that if ICAO or the parties to the Montreal Convention had construed Article 1 of the Montreal Convention "as applying to the actions of States against civil aircraft, the resolutions and debates leading to their adoption would have stated that the Montreal Convention, as well as the Chicago Convention, had been violated" is completely misplaced[436]. The Council had no authority to act under the Montreal Convention, and thus did not do so. Moreover, ICAO had no power to rule on the Montreal Convention's interpretation or application, or whether it had been violated in the circumstances of the case.

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[435] Moreover, at the time of the Libyan incident, Libya was not yet a party to the Montreal Convention and thus could not have invoked it in any event.

[436] U.S. Preliminary Objections, pp. 179-180.

5.114 For these reasons, it is not surprising that the debates before the ICAO Council relating to the destruction of Flight IR 655 also did not refer to the Montreal Convention. Any consideration by the Council of the application or interpretation of the Montreal Convention to the incident would have been ultra vires.

5.115 Instead, ICAO dealt with the case on the basis of the Islamic Republic's claims set out in different telexes to ICAO, qualifying the United States' action as a direct interference against the safety and regularity of international air transport operation. The Islamic Republic then requested from the Council the following[437]:

- Explicit recognition that the downing of Flight IR 655 was a breach of international law and of the legal duties of the United States;
- Recognition of the fact that that Contracting State bore international responsibility for the criminal actions of its officials, especially where it had authorized and ratified such actions;
- Explicit condemnation of the use of weapons against Flight IR 655 by the United States, a Member of ICAO;

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[437] See, Part IV above, paras. 4.31 to 4.33.

- Commissioning of a detailed fact-finding report;

- The setting up of an ad hoc commission (the ANC) charged with conducting an enquiry into the various legal, technical and other aspects of the shoot-down of Flight IR 655. This commission was to report to the Council for the purpose of taking the necessary action to devise relevant rules, regulations and standards, as well as to ensure their proper and effective implementation for the prevention of similar occurrences; and

- The immediate termination of obstacles, restrictions, threats and the use of force against the airspace of the Islamic Republic and the coastal States of the Persian Gulf, which endangered the safe and orderly operation of civil air transport in the region.

5.116 As previously explained, in addition to the condemnation of the United States for the shoot-down of Flight IR 655, the immediate concern of the Islamic Republic was that ICAO demand in the interim that the United States ensure the necessary coordination between the military activity of its naval forces in the Persian Gulf and foreign civil aviation in order to prevent similar disasters. The rest of the debate before the ICAO Council concerned the issues raised under the Chicago Convention since ICAO had no authority to address the interpretation or application of the Montreal Convention.

(iii) The irrelevance of ICAO's suggestions for new agreements or amendments to existing agreements

5.117 In support of its argument that the Montreal Convention is not applicable to the shoot-down of Flight IR 655, the United States further contends that "the response of ICAO to the use of force by States against international civil aviation has been to consider new international agreements[438]. The United States adds that if recourse to force by States was already dealt with by the Montreal Convention, there would have been no need to propose, as occurred during the Extraordinary Sessions of the ICAO Assembly in 1973 and 1984, the adoption of new conventional instruments or the amendment of the Chicago Convention.

5.118 As the United States rightly points out, one of the principal impetuses for the proposal in 1973 to amend the Chicago Convention came from the diversion and seizure of a Lebanese civilian aircraft by Israeli warplanes on 10 August 1973[439]. It does not follow from this, however, that such amendments would have been superfluous had the Montreal Convention already covered the use of force by States against civil aircraft. As will be seen, there were other compelling reasons why ICAO debated incorporating the Hague and Montreal Conventions into the Chicago Convention.

5.119 What is significant about the Lebanese incident is that it involved an action taken against a civil aircraft that was not already covered by either the Hague or Montreal Conventions. This was not because these conventions did not concern State actions, but rather because neither of them dealt with the same kind of interference in civil aviation as had occurred in connection with the diversion of the Lebanese aircraft.

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[438] U.S. Preliminary Objections, p. 181.

[439] Ibid., p. 182.

5.120 The Hague Convention, it will be recalled, deals with offences committed by persons and their accomplices who, on board an aircraft in flight, seize or otherwise unlawfully take control of that aircraft. Consequently, nothing in the Hague Convention would have covered an incident where foreign military aircraft had diverted a civil airliner.

5.121 The Montreal Convention, on the other hand, does not address "interference" with civil aircraft in the broad sense of the term, but rather deals with the actual destruction of, or the attempt to destroy, an aircraft in flight or an act of violence against a person on board if that act is likely to endanger the airplane's safety. Thus, nothing in the Montreal Convention would have covered the Lebanese aircraft incident either since the destruction of the aircraft was not in question.

5.122 It is clear that one of the considerations in proposing amendments to the Chicago Convention in 1973 was to close what were perceived to be gaps in the Hague or Montreal Conventions as illustrated by the Lebanese aircraft incident. There is no basis, therefore, for asserting that such amendments would not have been necessary if the Montreal Convention already covered State actions. For even if the Montreal Convention did cover State actions, as the Islamic Republic submits is the case, the incident involving the diversion and seizure of the Lebanese aircraft would still have fallen outside the scope of its application. In short, neither the Hague nor the Montreal Convention dealt with such a situation, and thus amendments were considered necessary in order to deal with "interference" in civil aviation in the broader sense of the word.

5.123 There was an additional, equally important reason why some delegates considered that elements of the Hague and Montreal Conventions should be incorporated into the Chicago Convention. This concerned the role of ICAO in matters that otherwise would fall within the purview of those two instruments.

5.124 As noted in the previous section, ICAO's role under the Montreal Convention is restricted essentially to disseminating information and reports submitted by contracting States. It has no independent power to examine questions under the Montreal Convention, to decide matters of interpretation or application, to provide enforcement measures, or to amend the Convention[440].

5.125 In order to broaden ICAO's jurisdiction over matters falling within the scope of the Hague and Montreal Conventions to match the powers provided for in the Chicago Convention, it was necessary to incorporate the provisions of the former into the latter. As the United States acknowledges, the proposals for the incorporation of the Hague and Montreal provisions into the Chicago Convention were aimed at subjecting States that violated the obligations contained in the first two Conventions to the "enforcement measures provided for in the Chicago Convention[441]". This argument constitutes the most cogent confirmation that the provisions of the Montreal Convention were not already subject to ICAO enforcement measures and consequently could not be relied upon before ICAO bodies - contrary to what the United States implies, when it stresses the fact that the Montreal Convention was never invoked before ICAO in incidents concerning attacks on civil aviation.

5.126 That one of the most important purposes behind the proposals to amend the Chicago Convention was to expand the role of ICAO has been noted by Judge Guillaume in his seminal work on Le Terrorisme Aérien. Judge Guillaume writes:

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[440] The situation was similar with respect to the Hague Convention, with ICAO's role limited to that provided for in Article 5 (corresponding to Article 9 of the Montreal Convention) and Article 11 (corresponding to Article 13 of the Montreal Convention).

[441] U.S. Preliminary Objections, p. 189.

> "Une telle incorporation aurait permis au Conseil de l'Organisation de procéder à des enquêtes, de formuler des recommandations et de régler d'éventuels différends en cas de violation des dispositions des Conventions de La Haye et de Montréal par les Etats parties. Par ailleurs ces Etats auraient pu être l'objet des sanctions actuellement prévues par l'article 88 de la Convention de Chicago"[442].

Under the Montreal Convention, of course, the Council had no such power to carry out investigations or report infractions and no power to impose sanctions.

5.127 Clearly, therefore, there was nothing redundant in incorporating these aspects of the Montreal and Hague Conventions into the Chicago Convention regardless of whether they already covered State actions. The intent was to provide ICAO with powers it did not otherwise have.

5.128 In the light of the above, it is clear that the United States' argument based on the fact that the ICAO Committee replied affirmatively to the following two questions: "Does the Executive Committee wish to include in the Chicago Convention, provisions of the Hague and Montreal Conventions?", and "Does the Executive Committee wish to include in the Chicago Convention provisions concerning acts of unlawful interference committed by States?" is misdirected. It is not surprising that no delegate judged as "redundant" the affirmative answers given to both questions since by incorporating provisions of the Hague and Montreal Conventions into the Chicago Convention, the role of ICAO would have been considerably expanded. All this did not mean, however, that the Montreal Convention did not already deal with the actions of the States as the United States incorrectly suggests[443].

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[442] Guillaume, G.: "Le Terrorisme Aérien", I.H.E.I. (1976/77) at pp. 48-49. Exhibit 77.

5.129 As for the U.S. argument that the proposal in 1984 to adopt a new Article 3 bis to the Chicago Convention would have been unnecessary if the Montreal Convention had already covered State actions against civil aircraft, it too falls short of the mark. It is well known, as the Islamic Republic pointed out in its Memorial, that in adopting Article 3 bis the ICAO Assembly did not intend to create a new rule of law, but to reflect a pre-existing one[444]. This simply confirms that the mere fact that there were proposals to amend the Chicago Convention does not in itself signify that the amendments suggested were not already part of the corpus of existing law under the Convention. As in the case of Article 3 bis, it was perfectly possible to adopt new provisions in the Chicago Convention which reflected pre-existing rules of law.

5.130 In conclusion, both the practice followed by ICAO after State attacks against civil aircraft, and the proposals presented during the Diplomatic Conferences in 1973 and 1984 with a view to inserting in the Chicago Convention the explicit prohibition of armed attacks against civil aviation (proposals resulting in the adoption of Article 3 bis), are perfectly compatible with the Islamic Republic's contention that the Montreal Convention is applicable to unlawful acts committed by State agents against civil aviation.

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[443] U.S. Preliminary Objections, pp. 186-187. The kind of flaw in the United States' reasoning is symptomatic of a more general methodological defect in the pleading as a whole. Often the United States tries to draw inferences based on a pyramid of hypotheses as to what a conference or debate did not do, rather than focusing on the points where agreement was actually reached. This is why the Islamic Republic submits that the "practice" cited by the United States is irrelevant to the points at issue; it simply does not reflect any agreement by the contracting parties as to the Montreal Convention's interpretation.

[444] See, Memorial of the Islamic Republic, pp. 147-154.

CHAPTER III THE MONTREAL CONVENTION AND INTERNATIONAL ARMED CONFLICT

5.131 It has lastly been contended by the United States that "there is no indication that the drafters of the Montreal Convention intended it to apply to military forces acting in [international] armed conflict". According to the United States, since the confrontation between U.S. forces, which had intruded into the Islamic Republic's territorial waters on the morning that IR Flight 655 was shot down, constituted an "international armed conflict", the Montreal Convention is not applicable to this case[445].

5.132 The Sections below shall demonstrate that:

- The incident that led to the shoot-down of Flight IR 655 did not occur within the framework of an international armed conflict.

- Nonetheless, even assuming for the sake of argument that an international armed conflict was in progress between the United States and the Islamic Republic at the time of the downing, this would by no means entail the inapplicability of the Montreal Convention to the case at issue.

Section A. At the Time of the Shoot-down of Flight IR 655 the United States and the Islamic Republic Were Not Engaged in an International Armed Conflict

(1) The factual aspects of the issue

5.133 A review of the salient facts surrounding the destruction of Flight IR 655 reveals that the events of that day did not rise to the level of an international armed conflict as the United States would have the Court believe. It has been shown in Part II that the entire incident was triggered by the unilateral decision of the United States to send a military helicopter from one of its warships into Iranian territorial waters on the pretext of "assisting neutral shipping" when what was actually involved was a mission to harass and provoke the Islamic Republic's small patrol boats.

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[445] U.S. Preliminary Objections, pp. 200-203.

5.134 Having been warned away by the patrol boats, the helicopter left, only to be followed in a separate incident almost an hour later by the Vincennes itself which intruded some eight nautical miles into the Islamic Republic's territorial waters. In what was virtually an ambush, the Vincennes then attacked the small patrol boats, firing over 350 rounds at them.

5.135 This was not the first time that the United States had engaged in such activities. In October 1987 and again in April 1988 the United States had attacked and destroyed several offshore Iranian oil platforms. Moreover, by the admission of its own officials, the United States had also routinely harassed the Islamic Republic's patrol boats which were engaged in defensive measures necessitated by the war initiated by Iraq.

5.136 In contrast to its present arguments, never once during 1987 or 1988 did the United States indicate that it considered itself to be in an "armed conflict" with the Islamic Republic. To the contrary, the kind of incidents mentioned above were viewed by the United States as isolated incidents, and the United States repeatedly stressed to its public and to the United Nations that it did not seek a confrontation with the Islamic Republic and that it was neutral in the Iran-Iraq war[446]. Obviously, the concept of remaining neutral is fundamentally incompatible with the argument that a state of "armed conflict" existed.

5.137 The Commander of the Vincennes' sister ship, the Sides, has also belittled the idea that the United States was engaged in an armed conflict with the Islamic Republic. As noted in the Islamic Republic's Memorial, Commander Carlson of the Sides wrote after the downing of Flight IR 655:

> "My experience was that the conduct of Iranian military forces in the month preceding the incident was pointedly non-threatening. They were direct and professional in their communications, and in each instance left no doubt concerning their intentions[447]."

These words scarcely conjure up the image of a state of armed conflict between the two countries.

5.138 Nor did the United States ever intimate during the debates before ICAO or the U.N. Security Council that it had been engaged in an armed conflict with the Islamic Republic at the time of the shoot-down. That argument was surfaced for the first time purely as an afterthought in the United States' Preliminary Objections[448].

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[446] See, for example, the letter dated 23 May 1988 addressed by the Acting Permanent Representative of the United States to the United Nations to the Secretary-General. Exhibit 78. The U.S. Secretary of Defense, Mr. Weinberger, reiterated this position by emphasizing that the United States was not seeking further hostilities with the Islamic Republic. Financial Times, 21 October 1987. Exhibit 79.

[447] See, Memorial of the Islamic Republic, p. 75.

[448] Similarly, the United States made no reference to Article 89 of the Chicago Convention, an alternative that was open to it if it genuinely concluded that it and the Islamic Republic were belligerents.

5.139 Having itself instigated whatever confrontations occurred on 3 July 1988 by sending a military helicopter and, subsequently, two warships into the Islamic Republic's territorial waters, the United States cannot now seek to exculpate itself by arguing that these actions effectively suspended the operation of the relevant treaty provisions.

(ii) Legal considerations

5.140 Citing the Commentary by the International Committee of the Red Cross ("ICRC") on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, the United States asserts that "[a]lthough it may be difficult to define in the abstract all of the circumstances that constitute an armed conflict, there is universal agreement that hostile operations carried out by military units of one country against the military units of another (such as was occurring between the military forces of the United States and Iran at the time that Iran Air Flight 655 was downed) constitute an armed conflict"[449]. This argument may be controverted both in law and in fact, since in view of the facts, it is apparent that the state of relations between the two Parties did not then rise to the level of an international armed conflict.

5.141 The assertion that there is "universal agreement" on the definition of "armed conflict" that the United States presents is grossly exaggerated. It is true that the ICRC Commentary quoted by the United States suggests a very broad concept of such conflicts. Indeed, according to the Commentary, an international armed conflict is "any dispute between two States involving the use of their armed forces. Neither the duration of the conflict, nor its intensity, play a rôle: the law must be applied to the fullest extent required by the situation of the persons and the objects protected by it[450]. It must also be recorded that the ICRC Commentary on the four Geneva Conventions of 1949 takes the same view[451].

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[449] U.S. Preliminary Objections, p. 202.

5.142 However, this does not mean that the Commentaries set forth an authoritative view on the matter. Nor do they necessarily reflect the official position of States. In fact, the Foreword to the ICRC's Commentary on each of the Geneva Conventions specifically states that:

> "Although published by the International Committee, the Commentary is the personal work of its authors. The Committee, moreover, whenever called upon for an opinion on a provision of an international Convention, always takes care to emphasize that only the participant States are qualified, through consultation between themselves, to give an official and, as it were, authentic interpretation of an intergovernmental treaty"[452].

5.143 On the other hand, the very broad concept of armed conflict the Commentaries advocate is accounted for by the need - deeply and laudably felt by the ICRC - to try and expand, as far as possible, the scope and impact of the international humanitarian law of armed conflict in order to extend the protection accorded to non-combatants. To ascertain whether States uphold the very broad notion propounded by the ICRC, it is necessary to undertake an examination of their official views.

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[450] Commentary by the International Committee of the Red Cross on the Additional Protocols of 8 June 1977 to the 1949 Geneva Convention, p. 40, para. 62. U.S. Preliminary Objections, Exhibit 79.

[451] See, for instance, Pictet, J.S.: Commentary on the IVth Geneva Convention, Geneva, 1958, p. 20 ("Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place".) Exhibit 80.

[452] For example, see Commentary by the ICRC on the Fourth Geneva Convention, Foreword. Exhibit 81. A similar reference to this point is made in the Foreword to the ICRC's Commentary to the 1977 Additional Protocols where the President of the ICRC notes that "the ICRC also allowed the authors their academic freedom, considering the Commentary above all as a scholarly work, and not as a work intended to disseminate the views of the ICRC". Exhibit 81.

5.144 In this respect, it is first worth pointing out that the United States has not even ratified the 1977 Geneva Protocols. With respect to the position taken by the United Kingdom after the adoption of the two Geneva Protocols of 1977, reference can be made to the manual "The Law of Armed Conflict" prepared under the Direction of the British Chief of the General Staff and approved in 1981 by the U.K. Ministry of Defence. In Section 2, para. 4 of the Manual it is stated that:

> "Because of the consistent failure of countries to recognise the existence of a state of war, the term "law of armed conflict" is strictly more accurate than "the law of war". The aim is to ensure the wider application of the law of armed conflict which applies if there is
> a. a war; or
> b. occupation of the territory of one state by another;
> or
> c. sustained and concerted military operations akin to war"[453].

5.145 It is apparent from the above that in the official opinion of the United Kindom's authorities, not every "difference" between the armed forces of two or more States can amount to an "international armed conflict" coming within the purview of the Geneva Conventions and Protocols. Only those armed clashes that involve such large-scale and protracted hostilities as to be "akin to war" can be classified as "armed conflict".

5.146 An even more significant piece of evidence as to the opinion of States can be found in Article 1, paragraph 2 of the Second General Protocol Additional to the 1949 Geneva Conventions, of 10 June 1977. This provision stipulates that:

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[453] See, The Law of Armed Conflict, Manual prepared by the U.K. Chief of the General Staff, 1981, p. 6 (emphasis added). Exhibit 82.

> "This Protocol [concerning non-international armed conflict] shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts[454]."

5.147 As was rightly pointed out by Professor K.J. Partsch, this provision furnishes the answer to the question of what is to be meant by "armed conflict"[455]. In this respect, the provision has a value and significance which goes beyond the definition of "non-international armed conflict". The specific terminology used by the Diplomatic Conference ("as not being armed conflicts") shows that the draftsmen intended to clarify what in their view was meant by such a notion - a notion equally applicable to "international armed conflicts". In the light of these considerations, it follows that "isolated and sporadic acts of violence and other acts of a similar nature" do not reach the threshold required for an "international armed conflict" in the same manner as they do not constitute a "non-international armed conflict".

5.148 That the law of armed conflict does not encompass isolated and sporadic military confrontations is borne out by close scrutiny of the contents of that law. It embraces such rules as those on the protection of civilians in hospital and safety zones and localities, the so-called neutralized zones, on the treatment of aliens in the territory of a party to the conflict, the regulation of occupied territories, the treatment of internees - to quote just the major provisions of the Fourth Geneva Convention of 1949 - as well as all the detailed regulation of prisoners of war that can be found in the Third Geneva Convention of 1949 and the extensive legal regulation of the condition of the sick, wounded and shipwrecked contained in the First and Second Geneva Conventions.

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[454] Emphasis added.

[455] Partsch, K.J.: "Armed Conflict", in Bernhardt, R. (ed.): Encyclopedia of Public International Law, Vol. 3, 1982, p. 25 at p. 26. Exhibit 83

5.149 If all these rules do not apply to an isolated incident between the armed forces of two States, the obvious reason for this non-application is that the incident does not fall within the province of armed conflicts proper, although of course such incidents could remain subject to those "elementary considerations of humanity, even more exacting in peace than in war", to which the Court has rightly adverted in the Corfu Channel case[456].

5.150 Having reviewed in Section (i) above the factual aspects of the matter, if one were to term the events of 3 July 1988 an "international armed conflict", then practically any resort to force by a State against another State, whatever the scale and duration of the use of force, would have to be defined as an "international armed conflict" making operational all the detailed and numerous aforementioned rules and principles of the law governing such conflicts. The absurdity of such consequences clearly show how unrealistic and unacceptable it would be to refer to the breaches of international law perpetrated by the United States on 3 July 1988 as an "international armed conflict" for the sole purpose of the United States' avoiding liability.

5.151 The correct legal description of the position of the Parties is as follows: while the Islamic Republic and Iraq were engaged in an international armed conflict that had taken on the proportion and characteristics of a war proper, the position of the United States vis-a-vis this war was that of a third party, bound by the duties - stemming from neutrality law - of impartiality towards the belligerents and non-participation in the armed conflict, particularly where the United States had repeatedly professed its neutrality in the war.

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[456] Corfu Channel, Merits, Judgment, I.C.J. Reports 1949, p. 4, at p. 22.

5.152 At the same time, vis-à-vis the two belligerent countries, the United States was also bound by all the rules and principles of the law of peace - to the extent that they had not been replaced by the laws of neutrality - including the U.N. Charter and all the various conventions protecting the safety of civil aviation, among which of course is the Montreal Convention[457].

SECTION B. Even Assuming that the United States and the Islamic Republic Were Engaged in an International Armed Conflict, Quod Non, the Montreal Convention Was Nevertheless Applicable

5.153 Even assuming, arguendo, that the United States is right in holding that at the time of the downing of Flight IR 655 the two States were engaged in an international armed conflict, it would by no means follow, as the United States contends, that the Montreal Convention was suspended or otherwise inapplicable as between the two States. In fact, the view advocated by the United States in its Preliminary Objections is based on a misconception: the United States fails to see the fundamental difference between an international armed conflict and a state of war. This is a crucial point on which it is necessary to dwell, if only briefly.

5.154 According to the unanimous view taken in the legal literature, war is only a class of international armed conflict. More specifically, war is an armed conflict characterized by the following elements:

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[457] It is necessary to add that to the extent the Court deems it necessary to determine whether there was an "armed conflict" such as to suspend the application of the Montreal Convention, this would also be an issue to take up at the merits stage since it would relate not only to the facts of the case, but also to the question of the interpretation, and particularly the application, of the Montreal Convention.

(i) The intention of at least one of the belligerent States to replace the law of peace with the status of belligerency vis-a-vis the other belligerent (so called animus belligerandi);

(ii) The actual replacement of the law of peace with the law of war in its entirety between the belligerents;

(iii) The applicability of the law of neutrality, in its entirety, to the relations between each belligerent and third States;

(iv) The breaking off of diplomatic relations between the belligerent States;

(v) The termination of political treaties between the belligerents, the suspension of multilateral treaties not radically incompatible with the status of war, in addition to the specific treaties on warfare becoming operational for them[458]

5.155 International armed conflicts that are not elevated to the rank and status of war do not entail the radical change in legal status between the belligerents as well as between each belligerent and third States as is rendered necessary by the state of war.

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[458] See, in particular, Schindler, D.: "State of War, Belligerency, Armed Conflict", in Cassese, A. (ed.): The New Humanitarian Law of Armed Conflict, Vol. I, Napoli, 1979, pp. 3-20, Exhibit 84. See, also, Skubiszewsk K.: "Peace and War", in Bernhardt, R. (ed.): Encyclopedia of Public International Law, Vol. 4, 1982, pp. 74-78, Exhibit 85.

5.156 Contrary to what the United States argues now, at the time of the incident it recognized that no such radical change had occurred such as to suspend the operation of its international obligations under the Montreal or other Conventions. Certainly, the United States gave no notice, whether under Article 65 of the Vienna Convention on the Law of Treaties or otherwise, that it considered any conventions to be so suspended. Moreover, as alluded to above, the United States also did not invoke Article 89 of the Chicago Convention regarding suspension of its obligations thereunder, and never raised the issue in the various parliamentary debates before ICAO or the United Nations in which it participated. Even if this had not been the case, as one commentator has noted, [a]cts directed against the safety of international civil aviation as a rule are not covered by the international law of war[459]. Still less would they be covered by the doctrine of "armed conflict".

5.157 To the extent that the United States argues that the drafters of the Montreal Convention would have had to address a myriad of issues relating to the acts of military forces if they had intended the Convention to apply to military forces acting in an armed conflict, there is no support for such an alarmist contention. The United States seeks to buttress its argument by referring to Articles 25-30 of the First Additional Protocol to the Geneva Convention of 1949[460]. Yet these articles apply to the activities of domestic, military or civilian medical aircraft involved in non-scheduled domestic operations, in un-established air routes, and used in military or police services although exclusively assigned to medical transport. As such, medical aircraft are not covered by the Montreal Convention under Article 4, paragraphs 1 and 2. For that reason, they have been given a limited protection in the Protocol. This situation therefore has nothing t do with civil aircraft involved in regularly-scheduled international commercial flights in predetermined air corridors which are covered by the Convention.

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[459] See, Hailbronner, K.: "Civil Aviation, Unlawful Interference With", in Encyclopedia of Public International Law, Vol. 11, 1989, p. 57 at p. 58. Exhibit 86.

[460] U.S. Preliminary Objections, pp. 203-204.

5.158 The United States also contends that the drafters of the Montreal Convention would have had to pay attention to the 1923 draft Hague Rules of Aerial Warfare if they had intended the Convention to apply to the actions of a State's armed forces[461]. However, this argument fails to take int consideration that the draft 1923 Rules were never adopted in a legally binding form.[462]

5.159 In this respect, the United States' argument exhibits a remarkable inconsistency. On the one hand, the United States seeks to rely on the 1923 draft Rules to support its argument that the Montreal Convention is n applicable to this case. On the other hand, the United States, as well as exper authorities in the field, have consistently held that there are no set rules govern aerial warfare. As U.S. Major W.G. Downey observed in the Proceedings of th Amercian Society of International Law, "as you are probably aware, there are rules governing aerial warfare[463]." Similarly, de Saussure has concluded:

> "There is no dearth of opinion that in the matter of a fare there are, in fact, no positive rules... 'In so sens a rhetorical one' wrote Professor Stone in 1955 'can the still be said to have emerged a body of intelligible rule air warfare comparable to the traditional rules of land a

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[461] Ibid., pp. 204-205.

[462] See, Documents on the Laws of War (Roberts, A. and Guelff, R., eds., Oxford, 1982, p. 121. Exhibit 87.

[463] Downey, Revision of the Rules of Warfare, Proceedings of th American Society of International Law, Forty-third Session, p.102, at p.107. This view is endorsed in the U.S. Department o Air Force's Pamphlet No. 110/31 of 1976 (p.31) which notes The Hague draft Rules of 1923 "do not represent customary national law as a total code" even though they "have some because emminent jurists prepared them".

sea warfare'"[464].

5.160 Moreover, the United States' argument also ignores the duties that a State's military forces have to coordinate their activities with civil aviation authorities under Annexes 2, 11 and 15 to the Chicago Convention. As ICAO has already observed, the United States failed to respect these obligations, as well as those under the Chicago Convention, which were in no way suspended in connection with its activities in the Persian Gulf[465]. Of course, it is significant that the United States does not raise a similar argument with respect to the Treaty of Amity for the period from 1980 through 1988. Since the United States constantly was relying on the Treaty before this Court, the Iran-U.S. Claims Tribunal, and its own domestic courts during this period, the United States obviously had no interest in arguing that the Treaty's effect was suspended[466].

5.161 As for the United States' assertion that the Islamic Republic never complained to the ICAO Council that the Montreal Convention had been violated when it reported that Iraq had shot down a civilian aircraft in 1986[467], this argument suffers the same fate as the United States' other references to previous aerial incidents. The short answer is that the Islamic Republic requested ICAO to condemn Iraq's actions, including its issuance of an illegal NOTAM, under the Chicago Convention because that was the Convention under which the ICAO Council had authority to act. As noted above, the Council had no similar power to act with respect to the interpretation or application of the Montreal Convention.

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[464] De Saussure, The Laws of Air Warfare: Are There Any? U.S. Naval War College, International Law Studies, 1947-1977 Vol. 62 (1980), 280, at p. 281 citing J. Stone, Legal Control of International Conflicts (New York: Rinehart, 1954), p. 609.

[465] See, paras. 3.01-3.52 and paras. 4.15-4.32 of the Memorial of the Islamic Republic.

[466] At footnote 1 to page 91 of the U.S.Preliminary Objections, the United States only reserves its position as to the application of the Chicago Convention to surface vessels engaged in combat.

[467] U.S. Preliminary Objections, p. 207.

5.162 Thus, even assuming that the United States and the Islamic Republic were engaged in an international armed conflict at the time of the shoot-down, it would not follow that the Montreal Convention had somehow become inapplicable. Indeed, the Convention aims at safeguarding the safety of civil aviation, regardless of whether or not an international armed conflict is in progress. Close scrutiny of the object and purpose of the Convention's provisions shows that they are not incompatible with the international principles and treaty rules governing international armed conflicts; rather they supplement and strengthen the protection afforded by these principles and rules. Thus, while general principles on international armed conflicts require the belligerent parties not to attack civil aircraft[468], the Montreal Convention supplements this regulation.[469]

5.163 It can therefore be concluded that neither the text of the Montreal Convention nor the relevant international rules governing international armed conflicts warrant the view that the applicability of the Montreal Convention to the downing of Flight IR 655 was to be excluded on account of the existence of an international armed conflict between the United States and the Islamic Republic. On the contrary, the Montreal Convention usefully and conveniently supplements the principles and rules regulating armed conflicts, in that it restates and strengthens that humanitarian protection against unlawful attacks on civil aircraft, which constitutes one of the pillars of both the law of peace and the law of armed conflict.

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[468] As the First Geneva Protocol of 1977 has not yet been widely ratified (one of the States that so far have failed to ratify it being the United States), Articles 48-60 of the Protocol, concerning the general protection of the civilian population against effects of hostilities, are only binding on the contracting States.

[469] The same duty is provided for in Article 85 of the First Geneva Protocol, but of course this provision is only binding on contracting States.

5.164 In conclusion, whether or not the relations between the United States and the Islamic Republic at the time of the downing of Flight IR 655 are termed an international armed conflict, the applicability of the Montreal Convention appears in any case to be unquestionable.

PART VI

JURISDICTION UNDER THE TREATY OF AMITY

6.01 The compromissory clause in the Treaty of Amity on which the Islamic Republic relies as a basis of jurisdiction is contained in Article XXI(2), which provides:

> "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means[470]."

6.02 In its Preliminary Objections, the United States has raised four reasons why jurisdiction should be refused under the Treaty[471]. The United States alleges (i) that the Islamic Republic is asserting the Treaty in bad faith and is thus barred from invoking it because of its past conduct; (ii) that the Islamic Republic is seeking to transform the dispute into a different dispute from that raised in its Application; (iii) that the Islamic Republic may not rely on the Treaty's compromissory clause because it has made no effort to resolve the dispute by diplomacy; and (iv) that the Treaty of Amity is purely a commercial treaty and is thus irrelevant to the subject-matter of the Islamic Republic's Application, the shooting down of Flight IR 655 and its attendant circumstances.

6.03 As will be shown in this Part, these contentions do not stand up to scrutiny. For over ten years, the United States has consistently taken the position before this Court and the Iran-U.S. Claims Tribunal that the Treaty of Amity may be invoked against the Islamic Republic and that the Islamic Republic is barred from repudiating it. In these circumstances, the argument that the

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[470] Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran, signed on 15 August 1955, 284 U.N.T.S. 93, Exhibit 3 to the Memorial of the Islamic Republic.

[471] See, generally, U.S. Preliminary Objections, pp. 213-237.

Islamic Republic is now precluded from relying on the Treaty is not in good faith. Having repeatedly relied on the Treaty during this period, and having reaped the benefits of judicial decisions predicated on its application, it is the United States which should be precluded from objecting to the Treaty as a basis of jurisdiction. Moreover, while certain Iranian entities may have questioned the application of the Treaty in cases before the Iran-U.S. Claims Tribunal during this period, the Government of the Islamic Republic refrained from taking a position on the issue[472]. Even if the United States had not changed its position, therefore, and even if the Court and the Iran-U.S. Claims Tribunal had not consistently applied the Treaty, the Islamic Republic would still be entitled to invoke the Treaty here.

6.04 It is also clear that the Islamic Republic has not transformed the dispute into a different one from that introduced in its Application. It has simply added a complementary basis of jurisdiction without changing the underlying subject-matter of the case. Quite clearly, the attack and destruction of a civil aircraft navigating within its own airspace on a commercial flight, together with the issuance of illegal NOTAMs and other U.S. actions interfering with the Islamic Republic's aviation in the Persian Gulf, involve ipso facto a question whether there have been violations of the Treaty of Amity which provides, inter alia, for peace and friendship and freedom of commerce and navigation between the two States.

6.05 While the Islamic Republic has, as is customary, supplied greater factual detail in its Memorial to substantiate these claims, the United States has itself acknowledged the relevance of this material by arguing that the shooting down of Flight IR 655 by the *USS Vincennes* cannot be viewed in isolation, but must be examined against the backdrop of the Parties' actions in the Persian Gulf leading up to the incident. As a result, there is no basis for the United States' argument that simply because the Treaty was not mentioned in the Islamic Republic's Application, or because the Islamic Republic's Memorial discussed some of the relevant background events in greater detail, the Treaty cannot be raised as a valid basis of jurisdiction at this stage of the proceedings.

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[472] See, for example, INA Corporation v. the Government of the Islamic Republic of Iran, Award No. 184-161-1 (Lagergren, Chairman), 12 August 1985, reprinted in 8 Iran-U.S. C.T.R. 373, at p. 378 where the Tribunal noted that the Government of the Islamic Republic was not prepared at that time "to present its definitive views as to the validity of the Treaty".

6.06 With respect to the argument that the Treaty's compromissory clause cannot be invoked because the Islamic Republic made no effort to resolve the dispute by negotiation, this claim also falls short of the mark. Quite simply, the Treaty of Amity does not refer to the word "negotiations" and does not provide that negotiations, or even diplomacy, are a prerequisite to submitting a dispute as to its application or interpretation to the Court[473]. All that is required is that the dispute be "not satisfactorily adjusted by diplomacy", a state of affairs which the record shows exists in the present case.

6.07 Even if the Treaty provided otherwise, Part III has demonstrated that the United States has fundamentally misrepresented the rule relating to the need for prior negotiations, and has failed to take into account its own refusal to deal with the Islamic Republic on the matter. Moreover, the Court will be aware that the arguments on this issue advanced by the United States in its Preliminary Objections are in complete contradiction to the position it took with respect to the Treaty in the 1980 *Case Concerning United States Diplomatic and Consular Staff in Tehran*. In the sections that follow, the Islamic Republic will cite from the United States' pleadings in that case to show how the Preliminary Objections are manifestly incompatible with the United States' prior conduct.

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[473] In this regard, the general reference to "diplomacy" does not necessarily presuppose an exchange of views or "negotiations".

6.08 As for the assertion that the Treaty of Amity is irrelevant to the dispute that is the subject of the Islamic Republic's Application, this argument is essentially related to the merits of the dispute because it concerns the application or interpretation of the Treaty in the light of the relevant facts. Quoting passages from the merits phase of the Nicaragua case (which in itself is curious since the Court had already found it had jurisdiction over the dispute), the United States argues that its actions were justified as self-defense because the U.S. feared an imminent attack from the Islamic Republic and "perceived" the aircraft as hostile. Such arguments simply confirm that a dispute exists between the Islamic Republic and the United States over the interpretation or application of the Treaty. This is a dispute which must be decided at the merits phase - a conclusion reinforced by the Court's decision in the Nicaragua case, which concerned comparable treaty provisions as well as analogous acts of armed aggression by one State within the territory of another[174].

6.09 In contrast to the United States' approach, the Islamic Republic submits that, in examining the scope of the Court's jurisdiction under the Treaty of Amity, the correct starting point is the compromissory clause itself. Under Article XXI(2) of the Treaty, there are four prerequisites to the Court's jurisdiction:

(i) That there be a "dispute";

(ii) That the dispute relate to the "interpretation or application" of the Treaty;

(iii) That the dispute be one "not satisfactorily adjusted by diplomacy"; and

(iv) That there be no agreement between Iran and the United States to settle the dispute by some other pacific means.

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[174] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 246.

6.10 In the sections that follow, the Islamic Republic will show that each of these prerequisites is satisfied in this case. The Islamic Republic will also show that prior to the institution of these proceedings, the United States had strenuously argued that the compromissory clause in the Treaty of Amity had been drafted in a manner that was intended to be very broad, and that when the Treaty was being negotiated, the United States resisted any attempt to narrow its jurisdictional scope[475]. There are thus no impediments to the Court's exercising jurisdiction over the dispute under the Treaty.

6.11 Having set out these introductory comments, Chapter I will take up the fact that the Treaty remains in force between the Parties and the reasons why the Islamic Republic is not barred from invoking it. Chapter II then deals with the United States' assertion that the Islamic Republic has changed the nature of the dispute in its Memorial, and will show that this is not true. Chapter III sets forth the way in which the provisions of the Treaty are relevant to the subject-matter of the dispute and also demonstrates how there is unquestionably a dispute between the Parties as to its interpretation or application. Lastly, Chapter IV will indicate how the dispute has been shown to be one "not satisfactorily adjusted by diplomacy", and that the Parties have not agreed to settle it by some other pacific means.

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[475] See, paras. 6.61 to 6.64 below.

CHAPTER I THE UNITED STATES IS PRECLUDED FROM OBJECTING TO THE TREATY AS A BASIS OF JURISDICTION

SECTION A. The Treaty Remains in Force Between the Parties

6.12 It is appropriate to recall at the outset that the Treaty of Amity remains in force between the Parties. Under the Treaty, termination can only occur in accordance with Article XXIII, which provides in relevant part that:

> "2. The present Treaty shall enter into force one month after the day of exchange of ratifications. It shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein.
>
> 3. Either High Contracting Party may, by giving one year's written notice to the other High Contracting Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter."

6.13 The importance of respecting formal termination provisions such as those contained in the Treaty of Amity is underscored by Article 54 of the Vienna Convention on the Law of Treaties which provides that termination should take place "in conformity with the provisions of the treaty". Significantly, neither Party has ever invoked the provisions of Article XXIII(3) or suggested that the one-year period has begun to run. To the contrary, the United States has expressly acknowledged in its Preliminary Objections that it does not assert that the Treaty is not in force as a reason why jurisdiction should be refused[476]. Such an argument would, of course, be untenable given that the U.S. State Department has consistently maintained that the Treaty remains in force and that the State Department's official publication, Treaties in Force, continues to list the Treaty as valid and binding[477].

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[476] U.S. Preliminary Objections, p. 215.

[477] See, United States Department of State, Treaties in Force, 1 January 1990, p. 117. A copy of this document is attached as Exhibit 88. See, also, pp. 132-133 of the Islamic Republic's Memorial and Exhibit 54 thereto.

6.14 Both this Court and the Iran-United States Claims Tribunal have previously held that the Treaty of Amity survived the fundamental disruption in relations that occurred between the Parties as a result of the events of 1979 and 1980. In its judgment in the Case Concerning United States Diplomatic and Consular Staff in Tehran, the Court stated -

> "... although the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions remain part of the corpus of law applicable between the United States and Iran[478]".

6.15 This holding was cited with approval by the Iran-United States Claims Tribunal on several occasions. In Amoco International Finance Corporation v. The Government of the Islamic Republic of Iran (Virally, Chairman), for example, the Tribunal referred to the Court's reasoning in the Diplomatic and Consular Staff case to support the conclusion that the Treaty remained in force after the rupture of relations between the two States in late 1979. The Tribunal added that "the rights and obligations it established were valid and enforceable according to its terms[479]".

6.16 It is true that the Court's ruling in the Diplomatic and Consular Staff case only went so far as to hold that the Treaty remained in force as of 29 November 1979 when the United States submitted its dispute to the Court. Similarly, the decisions of the Iran-United States Claims Tribunal have been limited to holding that the Treaty was still in effect as of January 1981, the date by which claims submitted to the Tribunal had to have arisen.

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[478] Case Concerning United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980, p. 28, para. 54.

[479] Award No. 310-56-3, 14 July 1987, reprinted in 15 Iran-U.S. C.T.R. 189, at p. 219.

6.17 Nonetheless, it is clear that no events have taken place since 1980 which could be viewed as terminating the Treaty. As noted above, the United States continues to view the Treaty as remaining in force, and neither Party has taken any of the formal steps required under Article XXIII(3) of the Treaty to terminate it even though they could have done so if they had so chosen.[480] As noted by the Iran-U.S. Claims Tribunal, all the most serious disruptions in the Parties' relations "took place before the Court's finding that the Treaty was still in force"[481]. Moreover, as recently as 1989, the United States Federal District Court held that the Treaty of Amity was, as of the date of the opinion, still in force and provided a "controlling legal standard" with respect to certain issues of compensation in the event of expropriation or nationalization[482]. Consequently, the Treaty remains part of the corpus of law between the two States, particularly the provisions in its compromissory clause providing for the jurisdiction of the Court[483].

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[480] As the Iran-United States Claims Tribunal observed, "... Iran could easily have denounced the Treaty if it thought it proper to do so. Such a decision could be notified at any time, pursuant to the procedure described in Article XXIII, paragraph 3 of the Treaty, or made known by any other means of publicity. If Iran considered the judgment of the International Court of Justice to be in error in finding that the Treaty remained applicable, it could certainly have remedied the error by an express notice of termination to remove all doubt." Amoco International Finance Corporation v. Islamic Republic of Iran, supra, 15 Iran-U.S. C.T.R. at p. 218.

[481] Ibid., p. 217.

[482] Foremost McKesson Inc., v. Islamic Republic of Iran, Civ. action No. 82-0220 (D.D.C. 18 April 1989), reprinted in Iranian Assets Litigation Reporter, 28 April 1989, at pp. 17177-17178, affirmed on these points by the United States Court of Appeals (D.C. Cir.), 15 June 1990, reprinted in Iranian Assets Litigation Reporter, 16 July 1990, at pp. 19093, et seq. It should be noted in connection with these two cases that the U.S. courts disregarded Iran's arguments as to the proper jurisdictional fora for disputes arising under the Treaty. Exhibit 88A.

SECTION B. The Islamic Republic Is Not Barred from Invoking the Treaty

6.18 In its Preliminary Objections, the United States asserts that the Islamic Republic is invoking the compromissory clause of the Treaty of Amity in bad faith and that it should be therefore barred from relying on the Treaty as a basis of jurisdiction[484]. Such a contention is demonstrably without merit in the light of the United States' own conduct relating to the Treaty. For over ten years, the United States has successfully sought to apply the provisions of the Treaty against the Islamic Republic in a variety of different fora, and has argued that the Islamic Republic is barred from repudiating it. Consequently, it is the United States' own argument which shows a lack of good faith.

6.19 So inconsistent is the United States' assertion in this case with its previous position that it is not surprising that the Preliminary Objections show less than full confidence in the "estoppel" claim. The sole conclusion which the United States is able to muster is: "[a]t a minimum ... it is appropriate for the Court to be rigorous in determining whether Iran's sudden introduction of this Treaty as a basis of jurisdiction is sustainable[485].

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[483] It is quite clear that the Parties knew how to terminate bilateral treaties which they no longer wished to continue. Following the Islamic Revolution, for example, the Parties terminated a 1959 Treaty of Cooperation between them. In contrast, they took no such action vis-a-vis the Treaty of Amity. See, Diplomatic Note No. 191 dated 19 Nov. 1979, by the Embassy of the Islamic Republic of Iran to the U.S. Department of State concerning the termination of the Agreement of Cooperation between the Imperial Government of Iran and the Government of the U.S.A. dated 5 March 1959. (Exhibit 89). See, also, Reisman, W.M.: "Termination of the USSR's Treaty Right of Intervention in Iran", in Am. J. Int'l. L., Vol. 74 (1980), at p. 153. Exhibit 89.

[484] U.S. Preliminary Objections, pp. 213-214.

[485] Ibid., pp. 215-216.

6.20 The essence of the United States' contention is that because certain Iranian entities may have argued in other proceedings that the Treaty of Amity terminated following the fundamental changes that accompanied the Islamic Revolution, the Islamic Republic is barred from relying on the Treaty here. The United States cites the Islamic Republic's conduct in the Diplomatic and Consular Staff case as well as its position before the Iran-United States Claims Tribunal as support for this contention.

6.21 The reference to the Diplomatic and Consular Staff case is misplaced for several reasons. First, the Islamic Republic took no position as to the Treaty of Amity in that case and did not participate except to the extent of furnishing limited observations which the Court adverted to in its judgment. In contrast, the Islamic Republic is fully participating in this case and the Court is thus apprised of its views. Moreover, as the Court recognized in its judgment, the Islamic Republic's communications made in connection with the Diplomatic and Consular Staff case were directed at the wider aspects of the problems between it and the United States and did not address the status of the Treaty[486]. Nonetheless, even if the argument had been advanced, it is doubtful that the Court would have accepted it. As the Court stated:

> "It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty was to establish means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI, paragraph 2, were now to be found not to be open to the parties precisely at the moment when such recourse was most needed"[487].

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[486] United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 19, paras. 35-36. The Court also confirmed that Iran had not made any suggestion that the Treaty was not in force on 29 November 1979 when the United States submitted the dispute. Ibid., p. 28, para. 54.

[487] Ibid.

6.22 The Islamic Republic submits that this reasoning is equally applicable in the present case. Having already decided in the Diplomatic and Consular Staff case that the Treaty of Amity survived the deterioration of relations between the Islamic Republic and the United States in 1979 so as to provide a valid basis of jurisdiction in that case, a similar finding that the Treaty provides a basis of jurisdiction here would seem to follow. As for the United States, having previously invoked the Treaty in its favor and in favor of its nationals in cases where either it or its nationals were claimants, and having prevailed on this point and received positive decisions from the Court, it should not be allowed to preclude application of the Treaty here simply because it is the respondent.

6.23 The same comments may be made about the United States references to the Islamic Republic's position before the Iran-U.S. Claims Tribunal. In numerous cases before the Tribunal, U.S. claimants, with the assistance of the State Department, argued that the Treaty of Amity remained in force after 1981, and that Article IV(2) of the Treaty governed the standard of compensation allegedly due as a result of expropriations said to have taken place due to the Islamic Revolution.

6.24 In some of these cases, Iranian entities questioned whether the Treaty had survived the change of circumstances that occurred in 1979 and 1980. The United States vehemently opposed this position. To buttress its claim that the Treaty remained applicable, the State Department prepared a white paper in October 1983 entitled "Memorandum on the Application of the Treaty of Amity to Expropriations in Iran". That Memorandum emphasized the continuing validity of the Treaty by concluding that:

> "Because it has not been terminated in accordance with its terms or the provisions of international law, the Treaty of Amity remains in force between the United States and Iran[488]."

6.25 This position was further endorsed by the State Department when it issued a second Memorandum on the Application of International Law to Iranian Foreign Exchange Regulations in February 1984. That Memorandum also took the position that the Treaty remained in force and was applicable between the Parties[489].

6.26 As noted above, the Iran-U.S. Claims Tribunal accepted the United States' position that the Treaty survived the break in relations of 1979. Accordingly, the Tribunal has repeatedly applied the provisions of the Treaty against the Islamic Republic in a number of different cases[490].

6.27 It can be seen, therefore, that the situation is simply that while the Islamic Republic did not advance a position on the Treaty before the Court in the Diplomatic and Consular Staff case, certain Iranian entities have maintained a position before the Iran-U.S. Tribunal with respect to the Treaty which was not accepted as a matter of law. The United States advanced an opposing position that prevailed. There is absolutely no legal principle, and the United States has cited none, indicating that a party, having adopted a position on a matter of law which turns out to be incorrect, should be estopped thereafter from relying on a correct statement of the law. As one commentator has recently noted in a comprehensive study of the recent law and procedure of the Court, such a proposition cannot be accepted:

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[488] Copies of this Memorandum, together with a second Memorandum prepared by the State Department on the "Application of International Law to the Iranian Foreign Exchange Regulations", dated 15 February 1984, have been furnished with the Memorial of the Islamic Republic at Exhibit 54. For the convenience of the Court, both Memoranda are reproduced here in Exhibit 90.

[489] See, note to the Foreign Exchange Regulation Memorandum, ibid., p. 1185 (Exhibit 90).

[490] See, for example, Amoco International Finance Corporation v. Islamic Republic of Iran, supra, 15 Iran-U.S. Claims C.T.R. at p. 219.

> "Whether the idea of acquiescence or the idea of preclusion is applied, it is difficult to accept that a State is bound in its own affairs by a view of the law which it asserted against another State on a previous occasion"[491].

The same author then added:

> "If the facts are known to both States, each can form its own assessment of the legal situation which results from them, and the assertion by one of them that the legal situation is thus and thus - which means no more than that is the opinion of that State that such is the legal situation - cannot be relied on to support an estoppel to that effect"[492]."

6.28 What is most extraordinary about the United States argument is that in the 1983 State Department Memorandum referred to above, the United States cited exactly the same opinion of Sir Hersch Lauterpacht - to the effect that "a State cannot be allowed to avail itself of the advantages of a treaty when it suits it to do so and repudiate it when its performance becomes onerous" - to support the contention that the Islamic Republic was barred from repudiating the Treaty as it cites now in its Preliminary Objections for the proposition that the Islamic Republic is estopped from invoking the Treaty[493]. If ever there was an example of a State "blowing hot and cold", this is it.

6.29 The United States' argument is reminiscent of the argument that Pakistan advanced in the 1972 Appeal Relating to the Jurisdiction of the

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[491] Thirlway, H.: "The Law and Procedure of the I.C.J. 1960-1989", British Yearbook of International Law, 1989, p. 41. Exhibit 91.

[492] Ibid., p. 43 (footnotes deleted).

[493] See, Exhibit 90.

ICAO Council case. There Pakistan asserted that India was precluded from affirming the competence of the Court because she had maintained that the treaties containing the compromissory clauses upon which the Court's jurisdiction was based were no longer in force. The Court rejected this argument on a number of grounds including the following:

> "The argument based on preclusion could also be turned against Pakistan, - for since it is Pakistan not India which denies the jurisdiction of the Court, and affirms the force of the Treaties, it must be questionable whether she can be heard to utilize for that purpose an Indian denial of the force of the Treaties ...".

The Court went on to observe:

> "The question of the Court's jurisdiction on the other hand, is necessarily an antecedent and independent one - an objective question of law - which cannot be governed by preclusive considerations capable of being so expressed as to tell against either Party - or both Parties[494]."

6.30 In view of these considerations, the United States' argument cannot be relied upon to avoid the proper application of the Treaty of Amity as a basis of jurisdiction in this case.

CHAPTER II THE ISLAMIC REPUBLIC HAS NOT CHANGED THE NATURE OF THE DISPUTE BY INVOKING THE TREATY

6.31 The second argument advanced by the United States seeks to make use of the fact that the Islamic Republic only invoked the Treaty of Amity in its Memorial rather than in its Application[495]. While the United States realizes that it cannot go so far as to allege that the Islamic Republic is barred from invoking a supplementary basis of jurisdiction in its Memorial not mentioned in its Application, it does claim that by introducing the Treaty the Islamic Republic has transformed the nature of the dispute into one with a wholly different character from that submitted in the Application.[496]

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[494] Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. Reports 1972, p. 54, para. 16(c).

[495] U.S. Preliminary Objections, p. 217.

6.32 Such a contention fails to reflect either the facts or the law. It rests on the accusation that whereas the Application only concerned a single incident - the shooting down of Flight IR 655 - the Memorial went "far beyond its initial factual statement" so as to expand the complaint "to cover the effect of U.S. military deployments in the [Persian] Gulf, and of other U.S. actions not involving military force..."[497] A mere glance at the Application, however, reveals that it was not limited to the shoot-down alone. Moreover, the United States' own pleadings confirm that the "incident" cannot be viewed in isolation without taking account of the surrounding events leading up to the event.

SECTION A. **The Dual Nature of the Islamic Republic's Claims**

(i) **The claims based on the illegal use of force by the United States**

6.33 The United States does not dispute that the aspect of the Islamic Republic's claims based on the use of armed force to shoot-down Flight IR 655 has not changed with the submission of the Islamic Republic's Memorial. Quite clearly, the illegal nature of the shoot-down remains a central element of the Islamic Republic's claims under all three bases of jurisdiction invoked.

6.34 With respect to the Treaty of Amity, the shoot-down involves the question whether the United States has violated not only the whole purpose of the Treaty, but also the specific provisions of Article I which provides that "There shall be firm and enduring peace and sincere friendship between the United States of America and Iran". In and of itself, the destruction of a civil aircraft operating within its own airspace by a foreign warship that had intruded into the territorial waters of the State of registration of the aircraft is anathema to the principles underlying the Treaty.

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[496] Ibid., p. 218.

[497] Ibid., pp. 219-220.

(ii) The claims based on illegal interference with the Islamic Republic's commerce and navigation

6.35 Without repeating the points made in Part II, it is important to recall that the Islamic Republic's Application not only raised the question of the United States' illegal use of armed force; it also referred to the United States' "continuous interference with the Persian Gulf aviation" as one of the grounds for its contention that the United States had breached its international obligations[208]. The Islamic Republic drew attention to the fact that the United States had issued illegal NOTAMs and that its military forces operating in the Persian Gulf had failed to coordinate their activities with local air traffic control centres in charging the United States with violating Annex 15 of the Chicago Convention, as well as Recommendation 2.6/1 of the Third Middle East Regional Air Navigation (MID RAN) meeting of ICAO.

6.36 Both of these claims have a direct bearing on the Islamic Republic's commerce and navigation. The plain fact is that Flight IR 655 was engaged in a regularly scheduled commercial flight, navigating within the recognized international air route in its own airspace, when it was shot down by two missiles launched by the USS Vincennes which itself had intruded into the Islamic Republic's territorial waters. In addition, the continuous United States' interference in the Islamic Republic's aviation in the Persian Gulf prior to the incident also directly affected the Islamic Republic's commerce and navigation. By definition, such acts relate to the issue of freedom of commerce and navigation guaranteed under Article X(1) of the Treaty of Amity. As such, the United States' argument that the Application was only concerned with the shoot-down and that the Islamic Republic made no claim that the United States had infringed upon its commerce and navigation can be seen to be without merit.[499]

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[208] Application of the Islamic Republic, p. 8.

(iii) The appropriateness of the Islamic Republic's submissions

6.37 By its nature, an Application instituting proceedings before the Court is expected to summarize the main elements of the dispute submitted. As Article 38(2) of the Rules of Court makes clear, the purpose of the Application is to present a *succinct statement* of the facts and grounds on which the claim is based. It is thus entirely appropriate for a party to present a more fully developed statement of the facts and law in its Memorial, particularly where, as the Islamic Republic did, the applicant State reserves its right in its Application to supplement and amend its submissions.

6.38 Both of the Islamic Republic's previous pleadings conformed to these rules. In discussing elements of the United States' conduct leading up to the shoot-down in more depth in its Memorial, and in pointing out that the U.S. actions constituted breaches of the Treaty of Amity, the Islamic Republic in no way changed the fundamental nature of the dispute submitted to the Court in its Application. The shooting down of Flight IR 655 and the associated U.S. interference with the Islamic Republic's aviation remain the subject-matter of the dispute. These matters clearly give rise to questions of interpretation or application of the Treaty generally, as well as to Article I (providing for peace and friendship), Article IV(1) (providing that nationals of

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[499] U.S. Preliminary Objections, p. 219.

Iran be accorded 'fair and equitable treatment' by the United States) and Article X(1) (providing that there be freedom of commerce and navigation), specifically. Thus there is no basis for arguing that the essential nature of the case has changed from that presented in the Application.

SECTION B. The United States' Admission as to the Relevance of the Background Facts

6.39 What is striking about the United States' argument is that the relevance of the background facts to the destruction of Flight IR 655 has been expressly recognized by the United States in its Preliminary Objections. There the United States stated:

> "It is, however, important for the Court to appreciate that this incident occurred in the midst of an armed engagement between U.S. and Iranian forces, in the context of a long series of attacks on U.S. and other vessels in the [Persian] Gulf. *The incident of Iran Air Flight 655 cannot be separated from the events that preceded it* and from the hostile environment that existed on 3 July 1988, due to the actions of Iran's own military and paramilitary forces."[300]

6.40 This admission could not be more explicit. In the light of the extensive discussion devoted to the background facts in the Preliminary Objections (which includes an entire chapter and two annexes devoted to alleged Iranian attacks on neutral shipping during the Iran-Iraq war and the issuance by the United States of NOTAMS for aircraft in the Persian Gulf), the argument that the Islamic Republic is trying to transform the nature of the dispute beyond the shoot-down is unsustainable. If anything, the United States' selective discussion of the facts makes it all the more important for the Court to examine the merits of the dispute under the jurisdiction conferred upon it by the treaties invoked by the Islamic Republic. The actual shooting down of Flight IR 655 is intimately related to the factual circumstances that preceded and contributed to its occurrence and must be examined in that context.

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[300] *Ibid.*, p. 9 (emphasis added).

6.41 It follows from the above that the United States' attempt to rely on the Court's judgment in the jurisdictional phase of the Case Concerning Military and Paramilitary Activities in and against Nicaragua is misplaced. In that case, the Court observed that Article 38(2) of the Rules of Court only provides that an application should specify the legal grounds upon which the Court's jurisdiction is based "as far as possible[501]". An additional ground of jurisdiction may be brought to the Court's attention later provided that "the Applicant makes it clear that it intends to proceed upon that basis" and that "the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character[502]".

6.42 The United States has not taken issue with the Islamic Republic's declaration that it intends to proceed on the basis of the Treaty of Amity in this case [503]. Indeed, the point is indisputable. The Islamic Republic has alleged fundamental breaches of the Treaty arising out of the same events and subject-matter that was mentioned in its Application. The Islamic Republic fully intends to proceed with its claims under the Treaty of Amity as thus articulated, as well as under the other bases of jurisdiction it has invoked. It follows that this element of the test laid down in the Nicaragua case is fully satisfied.

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[501] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 427, para. 80. In the present case, the Islamic Republic was also under a time-constraint since, under Article 84 of the Chicago Convention, any appeal from the decision of the ICAO Council had to be made within 60 days during which time the Islamic Republic also had to name an Agent. In contrast, the United States took almost three months to name its Agent in the case after the Application was filed. See, para. 3.34, above.

[502] Ibid.

[503] See, Memorial of the Islamic Republic, p. 135.

6.43 As for the second criterion referred to by the Court, the same conclusion reached in Nicaragua applies here. In Nicaragua, the Court was dealing with a Friendship, Commerce and Navigation ("FCN") treaty that in all material respects was identical to the Treaty of Amity in this case. The Court was also dealing with a factual situation involving the use of armed force by one party against the other (the mining of Nicaragua's ports and territorial waters and the bombing of its airports by the United States) that closely parallels the situation in he present case. Despite the fact that Nicaragua had not referred to the treaty in ts application, the Court held:

> "Taking into account these Articles of the Treaty of 1956, particularly the provisions in, inter alia, Article XIX[504], for the freedom of commerce and navigation, and the references in the Preamble to peace and friendship, there can be no doubt that, in the circumstances in which Nicaragua brought its Application to the Court, and on the basis of the facts there asserted, there is a dispute between the Parties, inter alia, as to the 'interpretation or application' of the Treaty[505]."

6.44 These findings are especially relevant because of the emarkable similarities between the two cases. The Islamic Republic has cited extensively from the Court's decision in Nicaragua to underscore the importance of the fact that the provisions of the Treaty of Amity being invoked by the Islamic Republic do not come before the Court as a matter of first impression. Not only do both cases involve practically identical treaty provisions (including their ompromissory clauses), they also present similar factual questions relating to the infringement by one State of another State's sovereignty and the illegal use of armed force.

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[504] Article XIX in the Nicaragua/U.S. Treaty is identical to Article X(1) of the Iran/U.S. Treaty of Amity.

[505] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, I.C.J. Reports 1984, p. 428, para. 83.

6.45 For this reason, the Court's conclusion in Nicaragua - that the mere fact that a State does not expressly refer to a particular treaty as having been breached by another State in negotiations with that State does not bar the first State from invoking the compromissory clause in the treaty - assumes a special relevance[506]. As the Court observed:

> "The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do[507]."

6.46 This same reasoning applies mutatis mutandis to the present case. In its presentations before ICAO and the United Nations Security Council, as well as in its Application, the Islamic Republic asserted facts relating to the destruction of Flight IR 655 as well as to the U.S. presence and interference in the Persian Gulf generally leading up to the shoot-down. Now the United States complains that the Islamic Republic has widened its submissions under the guise of the Treaty of Amity to cover "the effect of U.S. military deployments in the [Persian] Gulf, and of other U.S. actions not involving military force...[508]". However, the United States is fully aware, and has been since the day that Flight IR 655 was attacked, that the Islamic Republic maintains that this conduct constituted a breach of the United States' international obligations. The United States' response, articulated before the U.S. Congress, the Security Council and ie ICAO Council, as well as in its Preliminary Objections, is that its actions were stified as self-defense. To support this argument, the United States has felt it ecessary to address in considerable detail the background events in the Persian ulf that preceded the destruction of Flight IR 655. As the Preliminary bjections concede:

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[506] Ibid.

[507] Ibid., pp. 428-429, para. 83.

[508] U.S. Preliminary Objections, pp. 219-220.

> "All these events are important in understanding why U.S. naval vessels came to be off the coast of Iran in 1988; [and] why on 3 July of that year the USS Vincennes feared an imminent attack from Iranian aircraft and reacted accordingly...[509]."

6.47 These arguments not only illustrate the relevance of the der aspects of the case, they are also directed to the merits of the dispute - a pute that crystallized at a very early stage after the shoot-down, and that was ther defined in the Islamic Republic's Application. What is evident is that the derlying nature of the case has not changed with the submission of the Islamic public's Memorial. The Memorial has simply sought to address in greater ail issues which the United States itself admits are relevant and which were eady alluded to in the Application.

6.48 Finally, it is necessary to add a brief word about the Court's ent decision in the Case Concerning Certain Phosphate Lands in Nauru (the osphate" case) in so far as it may have a bearing on the present proceedings. hat case, one of Australia's preliminary objections was based on the assertion Nauru had raised a "new claim" in its Memorial, not presented in its plication, which had the effect of transforming the dispute brought before the irt by the Application into a different dispute[510].

Ibid., p. 12.

Certain Phosphate Land in Nauru (Nauru v. Australia), Judgment, Jurisdiction and Admissiblity, p. 28, para. 63.

6.49 The Court upheld the objection on the grounds that if it ha to entertain the new claim on the merits -

> "... the subject of the dispute on which it would ultimately have to pass would be necessarily distinct from the subject of the dispute orginally submitted to it in the Application[511]."

Because consideration of Nauru's "new claim" would have involved the Court in having to consider a number of factual questions extraneous to the original claims, it was ruled inadmissible both in form and in substance[512].

6.50 The present situation may be readily distinguished from the situation in the Phosphate case. Unlike Nauru, the Islamic Republic did not raise a "new claim" in its Memorial arising out of a set of facts distinct from those addressed in its Application. Rather, the Islamic Republic introduced a supplementary basis for the Court's jurisdiction - the Treaty of Amity - which related to the same essential facts. While it is true that this additional basis of jurisdiction gave rise to the submission that the United States had breached its obligations under the Treaty, the important point is that the underlying subject-matter of the dispute remained unchanged from that presented in the Application. The dispute before the Court continues to arise out of the destruction of Flight IR 655 and the events in the Persian Gulf leading up to that incident. Both of these subjects were raised in the Application, and are thus fully admissible as claims under a supplementary basis of jurisdiction.

6.51 In short, unlike the situation in the Phosphate case, the Court here will not need to consider any new factual questions extraneous to the Islamic Republic's original claim in order to rule on the issues involving the

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[511] Ibid., p. 30, para. 68.

[512] Ibid., p. 31, para. 70.

Treaty of Amity. The underlying facts asserted in the Application form the subject-matter of the dispute under the Treaty, just as they did in the Nicaragua case. This reinforces the conclusion that, unlike in the Phosphate case, the invocation by the Islamic Republic of the Treaty of Amity in its Memorial has in no way served to transform the nature of the case brought before the Court.

CHAPTER III THE TREATY OF AMITY IS DIRECTLY RELEVANT TO THE SUBJECT-MATTER OF THE DISPUTE

SECTION A. The Existence of a Dispute over the Treaty's Interpretation or Application

6.52 Article XXI(2) makes it abundantly clear that any dispute as to the interpretation or application of the Treaty of Amity, not satisfactorily adjusted by diplomacy, may be submitted to the Court unless the parties agree to settlement by some other means. The first step, therefore, is to determine whether there is a dispute as to the Treaty's interpretation or application[513]. Thereafter, it will be necessary to examine whether the dispute is one not satisfactorily adjusted by diplomacy (this subject being taken up in the next Chapter).

6.53 This Court has provided numerous guidelines as to when a dispute exists over a treaty's interpretation or application. Since many of the Court's pronouncements in this respect have been addressed in Part III, they need only be briefly restated here.

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[513] United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 27, para. 52. The Court has already decided in the Diplomatic and Consular Staff case, and the United States does not dispute the fact, that although the words of Article XXI(2) do not expressly so provide, a case may be brought by a unilateral application by one of the parties. As the Court noted, "it is evident, as the United States contended in its Memorial, that this is what the parties intended".

6.54 The classical definition of a dispute has, of course, been given by the Permanent Court in the Mavrommatis case where the Court stated:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons[514]."

This definition was developed further by the Court in the Interpretation of Peace Treaties case where the Court stated:

> "Whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence ... There has thus arisen a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations. Confronted with such a situation, the Court must conclude that international disputes have arisen[515]."

To this may be added the observations of the Permanent Court in the case of Certain German Interests in Polish Upper Silesia to the effect that -

> "... a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views[516]."

6.55 This line of reasoning has been fully adopted by the United States in its pleadings in the Diplomatic and Consular Staff case. One of the jurisdictional issues presented there hinged on whether there was a dispute arising out of the interpretation or application of the same Treaty of Amity. In the oral hearings in that case, Counsel for the United States argued very forcefull that the mere fact that the United States had charged the Islamic Republic with iolating various provisions of the Treaty of Amity "inevitably requires the nterpretation or application of the Treaty[517]".

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[514] Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J. Serie A, No. 2, p. 11.

[515] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74.

[516] Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, P.C.I.J., Series A, No. 6, p. 14.

6.56 The United States' Memorial in the Diplomatic and onsular Staff case made the same point. There the United States stated -

> "... if the Government of Iran had made some contention in this Court that the United States interpretation of the Treaty was incorrect or that the Treaty did not apply to Iran's conduct in the manner suggested by the United States, the Court would clearly be confronted with a dispute relating to the 'interpretation or application' of the Treaty[518]".

6.57 Similar arguments were advanced by the United States with espect to the application and interpretation of the two Vienna Conventions on iplomatic and Consular Relations. The United States claimed that Iran's nduct condoning the seizure of the U.S. Embassy in 1979 violated several ovisions of these conventions. From this, the United States concluded: "If Iran ad disputed these claims, there would obviously be a 'dispute' as to the nterpretation and application' of the two Conventions[519]".

6.58 The Islamic Republic submits that the same reasoning pplies here. As has been demonstrated in Part III, not simply a dispute, but a ndamental difference of opinion between the Islamic Republic and the United ates over the facts and legal consequences relating to the destruction of Flight 655, emerged shortly after the incident occurred. The United States took the sition that it bore no responsibility for the incident because its actions were

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[7] Oral argument of Mr. Schwebel, I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran (USA v. Iran), p. 285.

[8] U.S. Memorial, ibid., p. 153.

[9] Ibid., pp. 142-143.

justified as self-defense. The Islamic Republic contested this view, and has asserted that the United States is morally, legally and financially responsible.

6.59 The existence of this dispute has persisted, and if anything has become more sharply defined, with the submission of each Party's written pleadings. In its Preliminary Objections the United States contends that the Treaty of Amity is irrelevant to the case because the Treaty is concerned with commercial relations between the two countries, not with the use of armed force[520]. The United States also argues that its actions were justified as self-defense and that they fell within a category of measures "necessary to protect its essential security interests" permitted under Article XX(1)(d) of the Treaty[521].

6.60 The Islamic Republic flatly rejects these contentions which are supported neither by the plain meaning of the Treaty, nor by the Court's ruling on similar treaty provisions in the Nicaragua case, nor by the fact that the aircraft was clearly involved in "commerce and navigation" within the meaning of Article X(1) of the Treaty when it was shot down. While more will be said about these issues later, for present purposes it may be noted that the Parties hold opposite views as to the performance or non-performance of obligations under the Treaty of Amity. As such, it cannot seriously be contested that a dispute exist between the Parties over the application or interpretation of the Treaty.

6.61 This conclusion is reinforced by the fact that when negotiating the Treaty of Amity with Iran, the United States insisted that a broac ased compromissory clause be included. As the United States pointed out in its Memorial in the Diplomatic and Consular Staff case:

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[520] U.S. Preliminary Objections, p. 226.

[521] Article XX(1)(d) provides that the Treaty of Amity "shall not preclude th application of measures ... necessary to fulfil the obligation of a High Contracting Party for the restoration of international peace and security, or necessary to protect its essential security interests".

> "It is significant that during the negotiations of the Treaty Iran sought to delete the term 'application' from the text and that the United States successfully resisted that suggestion, precisely because the United States wanted to avoid any narrowing of the jurisdictional provision"[522]."

6.62 The State Department took this issue very seriously at the ime. Noting that the matter was "fundamental" and that if Iran persisted in rguing that the word "application" should be deleted from the compromissory lause a solution would be "very difficult", the Secretary of State cabled the U.S. mbassy in Tehran during the negotiations stating that any restriction of the cope of the clause "might seriously curtail means for settlement [of] disputes nder U.S.-Iran Treaty"[523].

6.63 The inclusion of a compromissory clause in the Treaty was lso important for Iran. The Treaty was the first such treaty to include a broad-ased compromissory clause following the withdrawal by Iran of its declaration cepting the Court's jurisdiction in the aftermath of the Anglo-Iranian Oil case. ran was thus well aware of the content of Article XXI(2) and fully consented to e right of either Party to submit disputes unilaterally to the Court concerning e Treaty's interpretation or application. Had there been an intention to limit e scope of this Article, the Parties would not have agreed that "any" dispute ould be submitted to the Court in this manner.

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[22] I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran (USA v. Iran), p. 153, note 14 (emphasis added).

[23] See, Annex 50 to the U.S. Memorial, ibid., pp. 232-233, reproduced in Exhibit 92 hereto.

6.64 In the light of these considerations, the State Department's concerns were agreed to by Iran, and Article XXI (2) of the Treaty was drafted in such a way as to provide a broad jurisdictional mandate. What is important is to appreciate that the position that the United States took when originally negotiating the Treaty is fundamentally inconsistent with the stance it is adopting now. As the Court has previously held, the manifest intention of a State in drafting, accepting and construing a compromissory clause merits significant weight[524]. That intention was that Article XXI(2) should be as broad-based as possible and that disputes over the interpretation or application of the Treaty such as those presented by the Islamic Republic in this case could be submitted to the Court by either of the Parties.

6.65 It is well established that the subsequent conduct of the parties relating to a treaty can be taken into account as an indication of their real intentions. As McNair noted in his work on The Law of Treaties:

> ".... the relevant conduct of the contracting parties after the conclusion of the treaty (sometimes called "practical construction") has a high probative value as to the intention of the parties at the time of its conclusion. This is both good sense and good law[525]".

In this regard, the United States' position in the Diplomatic and Consular Staff case is of direct relevance to the application and interpretation of the Treaty here

6.66 On the basis of the United States' own conduct, and the legal precedents, it is apparent that there exists a dispute between the Islamic Republic and the United States over the interpretation or application of the

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[524] See, for example, the Court's decision in Anglo-Iranian Oil Co., Judgmen I.C.J. Reports 1952, p. 93, at pp. 104-107.

[525] McNair, L.: The Law of Treaties, Oxford, Clarendon Press, 1961, at p. 42 Exhibit 93.

Treaty of Amity. To borrow from the Court's words in the South West Africa case, the claims of the Islamic Republic are "positively opposed" by the United States[526]. In these circumstances, and bearing in mind the United States' previous position with respect to the jurisdictional scope of Article XXI(2) of the Treaty, the first two prerequisites to the Court's jurisdiction - that there be a "dispute" and that the dispute relate to the "interpretation or application of the Treaty" - are clearly satisfied.

SECTION B. The Relevance of the Treaty to the Subject-Matter of the Dispute

6.67 Instead of focusing on the relevant criteria under Article XXI(2) of the Treaty, the United States has attempted to divert attention by alleging that the Treaty of Amity as a whole is irrelevant to the subject of the Islamic Republic's Application because it is solely concerned with commercial relations between the two countries, not with damages resulting from an incident involving the use of armed force between the Parties[527]. Not only is this contention simply a resurrection of arguments raised by the United States in the jurisdictional phase of the Nicaragua case and soundly rejected by the Court, it is also flatly contradicted by the U.S. Preliminary Objections themselves where the United States seeks to justify the intrusion of its warships into Iranian territorial waters on 3 July 1988 on the basis of Article X, paragraphs (5) and (6) of the Treaty of Amity[528]. How can the United States claim that the Treaty has nothing to do with the incident, on the one hand, while invoking its provisions to justify its actions, on the other?

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[526] South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 319, at p. 328.

[527] U.S. Preliminary Objections, p. 226.

[528] Ibid., note 3 to p. 27.

6.68 The United States also asserts as an objection to jurisdiction that Article XX(1)(d) of the Treaty provides that the Treaty "shall not preclude the application of measures ... necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests"[529]. According to the United States, the actions of the USS Vincennes in shooting down Flight IR 655 were taken in self-defense because the Vincennes thought that it was being attacked by a hostile aircraft. Such actions, so the argument goes, were measures "necessary to protect ... essential security interests" of the United States and, thus, were permitted under Article XX(1)(d) of the Treaty. That being the case, the United States argues that the Court cannot entertain the Islamic Republic's claims[530].

6.69 The Court will appreciate that each of the United States' arguments rests on factual or legal assertions that fall to be proved at the merits stage of the proceedings. For example, the contention that the Treaty of Amity is a commercial treaty having nothing to do with acts of armed force reflects no more than the United States' position on the interpretation or application of the Treaty. While the Islamic Republic is confident that this position is incorrect, the question is precisely the type of issue over which the Court has jurisdiction to decide on the merits under Article XXI(2) of the Treaty. It is, in short, a classical example of a dispute over two opposing views as to the interpretation or application of a treaty.

6.70 Similarly, whether the actions of the Vincennes were legitimate acts of self-defense, or whether they fell within the ambit of Article

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[529] Ibid., p. 227 (emphasis supplied by the United States).

[530] Ibid.

XX(1)(d) of the Treaty relating to measures necessary to protect the essential security interests of the United States, are quintessentially merits questions. It is simply begging the question for the United States to assert that these actions were not covered by the Treaty, for that is the very issue relating to the Treaty's interpretation or application that the Court must decide.

6.71 With respect to the first point raised by the United States - that the Treaty of Amity is essentially a "commercial" treaty - it is worth noting that this is exactly the same argument that **Judge Schwebel advanced in his** Dissenting Opinion to the Nicaragua judgment on jurisdiction. He contended:

> "The Treaty as a whole has nothing to do with the use of force in international relations, or rights to be free of such use .... It is purely a commercial treaty ...[531]".

6.72 By an overwhelming majority, the Court rejected this view. Not only did the Court rule that it had jurisdiction over the substance of the matter, it subsequently decided at the merits stage that the use of armed force by the United States against Nicaragua's ports, airports and territorial waters violated Article XIX of the Nicaragua-U.S. treaty which provided (as Article X(1) of the Treaty of Amity does here) that, "Between the territories of the two Parties there shall be freedom of commerce and navigation[532]". In so doing, the Court also rejected the argument now being advanced by the United States that the applicant's claim had to arise out of a direct commercial link between the two parties to the treaty. No such requirement existed in the Nicaragua case, and no such requirement exists here.

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[531] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Dissenting Opinion of Judge Schwebel, p. 632.

6.73 That the Treaty is not limited exclusively to commercial matters is borne out by its title: "Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran". The concept of "amity", not to mention of economic relations and consular rights, is far broader than mere "commerce" and refers to a wide range of activities. As one American specialist has observed:

> "The single label, 'commercial', as applied to the type of bilateral treaty under consideration is perhaps misleading, for the scope of subject-matter commonly included comprises far more than provisions concerning the exchange of goods[533]".

6.74 These views coincide with those expressed by the former U.S. Advisor on Commercial Treaties with the Department of State, Herman Walker, who was involved in the 1950s in drafting various FCN treaties. As Mr Walker has explained:

> "An FCN treaty in its fully realized form is a house of many mansions, concerned with all citizens and their interests, great and small, and whether or not of an economic nature; it is implicitly concerned also, in a major way, with the intangibles of good will between nations in their everyday relations. Although the United States may now in general be motivated primarily by investment considerations in seeking such treaties, the other side may share this motivation only to a secondary extent[534]."

6.75 Further evidence that the United States does not view the Treaty of Amity as concerned simply with commercial relations is provided by the United States' own conduct with respect to the Treaty. It will be recalled that

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[532] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 147, para. 292(7) (dispositif).

[533] Wilson, R.A.: "Postwar Commercial Treaties of the United States", Am. J. Int'l L., Vol. 43 (1949), at p. 264. Exhibit 94.

[534] Walker, H.: "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice", 5 Am. J. Comp. L., Vol. 5 (1956), at p. 243. Exhibit 95.

when the United States instituted proceedings in the Diplomatic and Consular Staff case, it invoked the Treaty of Amity as a basis of jurisdiction. Obviously, that case dealt with wholly non-commercial matters.

6.76 In any event, the destruction of Flight IR 655 and the interference by the United States with the Islamic Republic's aviation in the Persian Gulf does have a direct and logical link to matters involving the Islamic Republic's freedom of commerce and navigation. As previously noted, Flight IR 655 was involved in a commercial flight and was navigating in the Islamic Republic's airspace when it was shot down[535]. As a result of the incident, commercial aviation in the Islamic Republic, including the activities of Iran Air, were severely disrupted and confidence undermined. This had an effect well beyond the immediate consequences relating to Flight IR 655 itself. As a result, even if the Treaty of Amity had been limited to "commercial relations", which it was not, the Islamic Republic's claims would still be admissible under the provisions of Article X(1) of the Treaty since they give rise to questions involving freedom of both commerce and navigation.

6.77 As for the second argument advanced by the United States - that its actions cannot be considered by the Court "unless it is first satisfied that the conduct complained of does not constitute "measures ... necessary to protect the essential security interests of the United States"[536] - this, too, was rejected by the Court in the *Nicaragua* case as a bar to jurisdiction *and* as a defense on the merits. Quite apart from the fact that it is impossible to see how the "essential security interests" of the United States include the need to shoot-down an unarmed, civilian aircraft thousands of miles from U.S. territory, the Court has made it clear that the whole issue is one to be addressed at the merits stage of the proceedings. Even under the United States' own reasoning, how can the Court be first satisfied that the conduct complained of is "necessary to protect essential security interests" if it does not examine the merits of the issue? As the Court recognized in the *Nicaragua* case:

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[535] The United States also implies that the Treaty only relates to "maritime commerce" (see, p. 231 of the U.S. Preliminary Objections). This argument is completely misplaced inasmuch as the Treaty refers to freedom of commerce in general, not to either maritime or air commerce. As the Supreme Court of Justice of the United States has recognized, "... although commerce includes traffic in the narrower sense, for more than a century it has been judicially recognized that in a broad sense it embraces every phase of commercial and business activity and intercourse". Jordan, Secretary of State of California v. Tashiro, 278 U.S. 123, 127-128 (1928).

[536] U.S. Preliminary Objections, p. 227.

> "This article [Article XX(1)(d) of the Treaty of Amity] cannot be interpreted as removing the present dispute as to the scope of the Treaty from the Court's jurisdiction. Being itself an article of the Treaty, it is covered by the provision in [Article XXI(2)] that any dispute about the 'interpretation or application' of the Treaty lies within the Court's jurisdiction. Article [XX(1)(d)] defines the instances in which the Treaty itself provides for exceptions to the generality of its other provisions, but it by no means removes the interpretation and application of that article from the jurisdiction of the Court as contemplated in Article [XXI(2)][537]."

6.78 In this context, the Court contrasted the wording that appears in Article XX(1)(d) of the Treaty of Amity with the wording that is found, for example, in Article XXI of the General Agreement on Tariffs and Trade. As the Court observed:

> "This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it 'considers necessary for the protection of its essential security interests', in such fields as nuclear fission, arms, etc. The 1956 Treaty [as well as the Treaty of Amity],

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[537] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222.

> on the contrary, speaks simply of 'necessary' measures, not of those considered by a party to be such[538]."

6.79 These holdings dispose of the United States' argument that Article XX(1)(d) somehow acts as an impediment to the Court's accepting jurisdiction in this case. Moreover, when the issue was ultimately addressed at the merits stage of the Nicaragua case, the Court decided that the United States' attacks on Nicaragua's ports could not "possibly be justified as 'necessary' to protect the essential security interests of the United States[539]". While the Islamic Republic will develop this point further at a subsequent stage of the proceedings, it submits now, prima facie, that the destruction of a commercial aircraft flying within the recognized international air corridor and within its own airspace cannot be viewed as necessary to protect the essential security interests of a State lying thousands of miles away under any reading of the facts.

6.80 Equally specious is the United States' claim that the Islamic Republic only paid "lip service" in its Memorial to the idea that the shooting down of Flight IR 655 was a violation of Articles IV(1) and X(1) of the Treaty of Amity[540]. This assertion is based on nothing more than the fact that the Islamic Republic's eighth submission, dealing with the United States' violation of Article X(1) of the Treaty of Amity resulting from the prior conduct of its warships and the issuance of illegal NOTAMs in the Persian Gulf, is longer than its fourth submission, dealing with the violations of the Treaty caused by the shoot-down itself. Such an argument is hardly serious. It merely serves to introduce yet a further reason why the Preliminary Objections cannot be considered as genuine preliminary objections in the true sense of the words: they are arguments which, in the final analysis, are related to the application or interpretation of the Treaty to the facts - i.e., to the merits of the case. As such, they neither possess an exclusively preliminary character nor divest the Court of its legitimate jurisdiction over the dispute.

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[538] Ibid. On the merits of the issue, the Court went on to hold that this provision does not apply to the exercise of self-defense. Ibid., pp. 116-117, para. 223.

[539] Ibid., p. 141, para. 282.

[540] U.S. Preliminary Objections, p. 222.

6.81 What is significant is that the same treaty provisions corresponding to Article IV(1) and X(1) of the Treaty of Amity were invoked by Nicaragua in its case against the United States. At the jurisdictional phase of that case, the Court accepted that the claims advanced gave rise to a dispute over the interpretation or application of the treaty[541]. Accordingly, the Court accepted jurisdiction on the issue, reserving the points that the United States had raised for the merits. In the present case, therefore, it can be seen that whatever objections the United States has raised in its Preliminary Objections with regard to the applicability of these Articles of the Treaty, they relate to their interpretation or application and are thus properly reserved for the next phase of the case.

6.82 From the foregoing it is clear that the Islamic Republic has established much more than a "reasonable connection" between the Treaty of Amity and its claims[542]. In this respect, it is important to recall that it is not incumbent upon the Islamic Republic to demonstrate at this stage that its interpretation of the Treaty is necessarily the correct one. It suffices that the connection between its claims and the Treaty is not remote.

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[541] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 428, para. 83.

[542] See, also, Riesman, W.M.: "The Other Shoe Falls: The Future of Article 36(1) Jurisdiction in the Light of Nicaragua" where the author finds significance in the fact that the Court has developed a theory that "there are certain activities of the United States which are such as to undermine the whole spirit of a bilateral agreement directed to sponsoring friendship between the two States parties to it". Am. J. Int'l. L., Vol. 87 (1987), at p. 171, citing I.C.J. Reports 1986, p. 138, para. 275. Exhibit 96.

6.83 Surely such a test is met here. As Professor Charney has noted in his comprehensive study on the subject of "Compromissory Clauses and the Jurisdiction of the International Court of Justice" -

> "... once a compromissory clause is invoked and the substantive provisions of the treaty are relied upon by the applicant, defenses on the merits purporting to limit the scope of the compromissory clause will be of little or no avail to the respondent. At most, the Court will seek to determine whether the applicant's allegations, standing alone, have a reasonable or plausible connection to the treaty containing the compromissory clause."

Professor Charney went on to add:

> "This review of the cases suggests that the International Court has not imposed a heavy burden on the applicant to establish that a dispute concerning the 'application or interpretation' of a treaty is involved once it is alleged that substantive provisions of the treaty would provide the applicant with a right to relief. Nor has a rule of restrictive interpretation been adopted[543]."

6.84 The defenses raised by the United States themselves point up the existence of a dispute between the Parties over the interpretation and application of the Treaty[544]. In the light of the plain meaning of the relevant provisions of the Treaty, and particularly in view of the Court's previous decision on closely analogous issues in the Nicaragua case, it would have been expected that the United States would have refrained from raising objections which have already been so soundly rejected by the Court. As in the Nicaragua case, most of the United States arguments concern issues to be resolved on the merits, and do not therefore create a bar to the Court's accepting jurisdiction.

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[543] Charney, J.I.: "Compromissory Clauses and the Jurisdiction of the International Court of Justice", in Am. J. Int'l. L., Vol. 81 (1987), at p. 883. Exhibit 97.

[544] See, Judge Lachs' Separate Opinion in the Nicaragua, Merits judgment, where he observed that "the jurisdiction established by the bilateral treaty of 1956 [the FCN Treaty] leaves no room for doubt" (Separate Opinion of Judge Lachs, I.C.J. Reports 1986, p. 165.

CHAPTER IV THE DISPUTE HAS BEEN SHOWN TO BE ONE "NOT SATISFACTORILY ADJUSTED BY DIPLOMACY"

6.85 Under Article XXI(2) of the Treaty of Amity, one of the preconditions for submitting a dispute as to the Treaty's interpretation or application is that the dispute "not be satisfactorily adjusted by diplomacy". In its Preliminary Objections, the United States argues that the Islamic Republic cannot invoke the Treaty as a basis of jurisdiction because it made no meaningful attempt to settle the dispute by negotiation prior to filing its Application. The United States adds that there cannot be said to be a "dispute" between the Parties when the Islamic Republic never approached the United States and asked for the relief sought from the Court under the Treaty of Amity[545].

6.86 There are several basic flaws undermining this line of argument. First, the United States misreads Article XXI(2) of the Treaty as requiring prior diplomatic negotiations when the Article in fact contains no such obligation. Second, the United States forgets that in the Diplomatic and Consular Staff case, it recognized that the test under Article XXI(2) was not whether the dispute "cannot be resolved by diplomacy", but whether it has already been satisfactorily adjusted by diplomacy, a situation that clearly has not occurred here[546]. Third, the United States fails to recall that it endorsed the view that "there is no rule of international law that a dispute in the international legal sense exists only if it is reflected in a formal exchange of official representations[547]". Finally, even if Article XXI(2) did provide that negotiations were a prerequisite to bringing a case, which it does not, international law still does not impose a requirement of negotiation when the parties' positions are so evidently opposed to each other that discussions would be futile.

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[545] U.S. Preliminary Objections, p. 234.

[546] See, Oral Argument of Mr. Schwebel, I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran (USA v. Iran), pp. 284-285.

SECTION A. Article XXI(2) of the Treaty Does Not Require Prior Negotiations

6.87 Article XXI(2) of the Treaty of Amity simply provides that disputes as to the Treaty's interpretation or application that have not already been satisfactorily adjusted by diplomacy, or subject to an agreement to settle the matter by some other pacific means, may be submitted to the Court. In accordance with normal rules of treaty interpretation enshrined in Article 31 of the Vienna Convention on the Law of Treaties, the provisions of Article XXI(2) "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

6.88 In the present case, there is absolutely nothing in the ordinary meaning of Article XXI(2) indicating that diplomatic negotiations have to have been exhausted as a precondition for instituting proceedings before the Court. The plain language found in Article XXI(2) provides no more than that disputes over the Treaty's interpretation or application can be submitted to the Court as long as they have not been satisfactorily adjusted by diplomacy or subject to some other means of settlement.

6.89 That this is the correct meaning of Article XXI(2) has been confirmed by the Court in the Diplomatic and Consular Staff case, as well as by several Judges in their separate opinions to the *Nicaragua* judgment on jurisdiction.

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[547] Ibid., p. 277.

6.90 In the *Diplomatic and Consular Staff* case, the Court did not suggest that prior negotiations were a precondition to the institution of proceedings under Article XXI(2) of the Treaty. Instead, the Court stated that:

> "Article XXI, paragraph 2, of the Treaty establishes the jurisdiction of the Court as compulsory for such disputes, unless the parties *agree* to settlement by some other means[548]."

This clearly implies that the dispute is admissible *unless* it has already been settled by some other pacific means, including diplomacy. However, there is no requirement that the Parties must first attempt to do so through negotiations.

6.91 This conclusion finds support in the Judgment of the Court and in the Separate Opinions of several Judges in the *Nicaragua* case. The Court in that case noted that the language employed in the compromissory clause of the treaty did not require the treaty to be invoked in negotiations between the parties when the respondent State was aware that the other party was alleging that its conduct constituted a breach of its international obligations[549]. In commenting on this language, Judge Jennings observed:

> "In the present case, the United States claims that Nicaragua has made no attempt to settle the matters, the subject of the application, by diplomacy. But the qualifying clause in question merely requires that the dispute be one 'not satisfactorily adjusted by diplomacy'. Expressed thus, in a purely negative form, it is not an exigent requirement. It seems indeed to be cogently arguable that all that is required is, as the clause precisely states, that the

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[548] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 27, para. 52 (emphasis supplied by the Court).

[549] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 428, para. 83.

> claims have not in fact already been 'adjusted' by diplomacy. In short, it appears to be intended to do no more than to ensure that disputes that have already been adequately dealt with by diplomacy, should not be reopened before the Court[550]."

6.92 Judge Ago also drew attention to the fact that the language used in Article XXI(2) of the Treaty does not require prior negotiations. He noted that the corresponding provision of the U.S.-Nicaragua treaty -

> "... does not make use of the wording to be found in other instruments which formally requires diplomatic negotiations to have been entered into and pursued as a prior condition for the possibility of instituting proceedings before an arbitral tribunal or court of justice[551]."

Judge Ago added that:

> "It is not always necessarily the case under these terms that diplomatic negotiations must be ascertained to have been first begun and then pursued, and finally to have broken down. The requirements of the text can even be met, under certain circumstances, without negotiations in the strict sense ever having taken place[552]."

6.93 Judge Singh expressed a similar view. He noted that the particular wording found in Article XXI(2) of the Treaty of Amity did not require prior negotiations as a condition precedent to bringing a case, and observed -

> "... if the wording of the compromissory clause of the Treaty is examined, it would appear that negotiations or representations affecting the operation of the present Treaty are not prescribed as a condition precedent to invoking the jurisdiction of the Court .... There is, however, no binding obligation to negotiate. The above

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[550] Ibid., Separate Opinion of Judge Jennings, p. 556.

[551] Ibid., Separate Opinion of Judge Ago, p. 515 (English translation).

[552] Ibid.

> conclusion would appear to be clearly justified from the wording [of the article][553]."

6.94 It is beyond question that the dispute between the Parties over the interpretation or application of the Treaty of Amity has not been satisfactorily adjusted by diplomacy. The dispute remains outstanding, as the Parties' pleadings have made abundantly clear. In as much as the Parties have not agreed to settle the matter by some other pacific means, it follows that the Court's jurisdiction is fully established under Article XXI(2).

SECTION B. **The Parties' Positions Were So Positively Opposed to Each Other that Negotiations Would Not Be Required in any Event**

6.95 Even if Article XXI(2) of the Treaty had been drafted in such a manner as to call for prior negotiations, such a requirement would not have been absolute under international law when the state of relations between the Parties was such that the pursuit of negotiations clearly would have been fruitless. While these points have been brought out in Part III above, it should be noted here that it is not necessary for negotiations to take place in order for there to be a "dispute" between two States. As the United States itself has conceded:

> "Any such rule would suggest a stultifying formalism inconsistent with the jurisprudence of this Court and with the realities of international life[554]."

6.96 The Islamic Republic has shown that the attitudes of the two Parties towards the events surrounding the destruction of Flight IR 655 were incapable of being reconciled. The Islamic Republic claimed before the ICAO

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[553] Ibid., Separate Opinion of Judge Singh, p. 445. Only Judge Ruda dissented from this view in his Separate Opinion; see, ibid., Separate Opinion of Judge Ruda, pp. 453-454.

[554] Oral Argument of Mr. Schwebel, I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran, (USA v. Iran), p. 277.

Council and the United Nations that the United States had committed fundamental breaches of international law. The Islamic Republic sought recognition through these bodies of the legal and financial responsibility of the United States.

6.97 The United States refused to accept such responsibility, and sought from the outset to justify its conduct on grounds of self-defense. As documented above, the Legal Adviser to the U.S. State Department repeatedly argued before the U.S. Congress that the destruction of Flight IR 655 had come about "pursuant to the lawful use of force". In these circumstances, he categorically asserted that "Iran is to blame ultimately for this accident[555]".

6.98 The record also shows that from the day the incident occurred to the institution of these proceedings, the U.S. Government had no intention of dealing with the Government of the Islamic Republic as far as discussing the matter or providing compensation was concerned. Indeed, the State Department had precise instructions not to deal with Iranian officials so as to avoid what was termed Iranian "interference[556]". In a candid assessment of the official United States position at the time, the State Department cabled its embassy in Bern on 23 September 1988 that the U.S. Government -

> "... continues to be unwilling to deal directly with the GOI [Government of Iran] ...[557]."

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[555] Hearings Before the Defense Policy Panel of the U.S. House of Representatives, Exhibit 26, p. 49. Similarly, the U.S. letter to the Security Council of 6 July 1988 sought to justify the Vincennes' actions as self-defense (see, Exhibit 98).

[556] See, State Department telegram dated 31 August 1988. Exhibit 24.

[557] Ibid.

6.99 In the light of this attitude, it ill-behooves the United States to argue that the Islamic Republic's claims cannot be brought because there have been no negotiations between the Parties. The Court has made it very clear that in considering the issue of negotiation, it will take into account the views of the States concerned who are, after all, "in the best position to judge as to political reasons which may prevent the settlement of a given dispute by diplomatic negotiations"[558]. In the present case, both Parties have made it evident that reconciliation of their respective positions by means of negotiation is not a realistic possibility, although the refusal of the United States to negotiate with the Islamic Republic diposes of the point in any event.

6.100 This view has been endorsed by Judge Ago in his Separate Opinion in the Nicaragua case where he stated:

> "More generally speaking, I am in fact convinced that prior resort to diplomatic negotiations cannot constitute an absolute requirement, to be satisfied even when the hopelessness of expecting any negotiations to succeed is clear from the state of relations between the parties, and that there is no warrant for using it as a ground for delaying the opening of arbitral or judicial proceedings when provision for recourse to them exists"[559]."

6.101 What matters is that the respective positions of the Parties on the essential issues have become well-defined on the international plane. As such, the Court's reasoning in the South West Africa cases that "it is not so much the form of negotiations that matters as the attitude and views of the Parties on the substantive issues of the question involved" assumes special relevance[560]. As the Court went on to note:

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[558] Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p.15.

[559] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 515-516 (English translation provided by the Registry).

> "So long as both sides remain adamant, and this is obvious even from their oral presentations before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties[561]."

6.102 This reasoning applies with equal force to the present proceedings. Given that the Parties had ample opportunity to express their positions before international organizations such as the United Nations and ICAO, yet these discussions failed to bridge their differences, no further "negotiations" were required. As the Court noted in the South West Africa case -

> "... diplomacy by conference or parliamentary diplomacy has come to be recognized in the past four or five decades as one of the established modes of international negotiation ... If [the dispute] is one of mutual interest to many States, whether in an organized body or not, there is no reason why each of them should go through the formality and pretence of direct negotiations with the common adversary State after they have already fully participated in the collective negotiations with the same State in opposition[562]."

6.103 All of these considerations lead to the conclusion that the claims brought by the Islamic Republic under the Treaty of Amity are fully admissible and subject to the Court's jurisdiction. The existence of a dispute over the Treaty's interpretation or application could not be clearer. The Parties' positions, presented publicly on many occasions since the shoot-down, have remained fundamentally opposed to each other. There is simply no reason to impose upon the Parties a needless charade of going through the motions of negotiations when the result of such discussions is a foregone conclusion. In short, there is no reason to delay bringing this case before the Court under the jurisdiction provided by Article XXI(2) of the Treaty of Amity.

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[560] South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 346.

[561] Ibid.

[562] Ibid.

PART VII

CONCLUSIONS AND SUBMISSIONS

7.01 On the basis of the foregoing, the Islamic Republic submits that it has shown that the Court has jurisdiction under all three agreements cited: the Chicago Convention, the Montreal Convention, and the Treaty of Amity.

7.02 The purely formalistic objections of the United States, such as that the Islamic Republic did not satisfy the requirement to negotiate its claims prior to instituting proceedings, or that it did not follow the correct procedural rules, or that it is estopped from invoking certain provisions, have been seen to be based on an incorrect assessment of the facts and a misapplication of the law.

7.03 With respect to the United States' objections that the treaties in question (particularly the Montreal Convention and the Treaty of Amity) have no connection to the claims submitted by the Islamic Republic, these are arguments that also do not stand up to scrutiny. Prima facie, claims based on he destruction of a civil aircraft flying within its own airspace on a commercial light have a direct relationship to the Montreal Convention and the Treaty of Amity, as well as to the Chicago Convention. In addition, the Islamic Republic's claims based on the United States' interference generally with its aviation, ncluding its issuance of illegal NOTAMs, also relate to the latter two instruments.

7.04 With respect to each of the three titles of jurisdiction, the slamic Republic has shown that a fundamental disagreement exists between the Parties as to the interpretation or application of the treaty in question in the light of the facts concerning the attack on Flight IR 655. This existence of such a dispute is critical in as much as the United States has consented to the jurisdiction of the Court to resolve questions relating to the interpretation or application of these treaties in their compromissory clauses. The Court is thus fully empowered to exercise its jurisdiction in this case based on the consent of the Parties.

7.05 As has been seen, many of the United States' arguments are directed to the merits of the dispute. They therefore highlight the fact that a disagreement exists between the Parties over the interpretation or application of the treaties in question. This is particularly the case with respect to the United States' assertions over the scope of the Montreal Convention and the Treaty of Amity. It is for this reason that the Islamic Republic has maintained that in so far as the Preliminary Objections are not rejected by the Court in a separate judgment, they should be declared not to possess, in the circumstances of the case, an exclusively preliminary character under Article 79(7) of the Rules of Court.

7.06 This case is an important one not only for the Parties to these proceedings, but for the families of the victims and the international community as a whole. International civil aviation is simply too important to be indiscriminately subject to the kind of attack that the United States launched against Flight IR 655. States are under a vigorous duty to ensure that their military forces, particularly when operating far from their own territory, do not endanger, threaten or shoot-down unarmed civilian aircraft.

7.07 In the present case, the arguments for the Court accepting jurisdiction are even more compelling in the light of the evidence that has surfaced concerning the policies that the United States was pursuing by the presence of its naval and air forces in the Persian Gulf. It is now undisputed that the United States' official policy of neutrality in the Iran-Iraq war was a sham and that the United States actively assisted Iraq in its war efforts against the Islamic

Republic. To this end, the United States took increasingly hostile and provocative actions against the Islamic Republic.

7.08 The events of 3 July 1988 were the culmination of this highly antagonistic policy - a policy which resulted on that day in U.S. warships and aircraft deliberately intruding into Iranian territorial waters to harass and attack Iranian patrol boats under the pretext of assisting neutral shipping. As the United States itself has now admitted, there were no requests for assistance from neutral shipping on that day. Thus the whole pretense for the events that triggered the tragic destruction of the aircraft has been seen to have no basis in fact. As a result of such a flawed policy, 290 innocent people met their deaths and serious damages were inflicted on the Islamic Republic. Yet the United States does not give up its presence in the Persian Gulf and the operation of its illegal NOTAMs, nor does it guarantee that such events will not reoccur.

7.09 The United States has already shown that it is predisposed to argue the merits of the case by its extensive treatment of the facts in its Preliminary Objections. In view of the fact that both States have accepted the principle of the Court's jurisdiction set out in Article 84 of the Chicago Convention, Article 14(1) of the Montreal Convention and Article XXI(2) of the Treaty of Amity, the Islamic Republic respectfully requests the Court to exercise its jurisdiction, as well as its supervisory powers, in this important case. The principles and rules of international law at issue are too critical to be sidestepped by the kind of formalistic preliminary objections that the United States has raised. As the Islamic Republic has shown, all of the requirements for jurisdiction to vest in the Court have been met with respect to each instrument invoked. Accordingly, the Islamic Republic seeks justice for the violations of international law perpetrated by the United States.

7.10 On the basis of the foregoing, the Islamic Republic respectfully makes the following submissions.

SUBMISSIONS

Having regard to the requirements of Article 84 of the Chicago Convention, Article 14(1) of the Montreal Convention and Article XXI(2) of the Treaty of Amity;

In view of the facts and arguments adduced by the Islamic Republic in these Observations and the applicable principles and rules of international law, and reserving its right subsequently to amend or modify these submissions in the light of the subsequent proceedings;

May it please the Court, rejecting all claims and submissions to the contrary:

To adjudge and declare:

1. That the Preliminary Objections of the United States are rejected in their entirety;

2. That, consequently, the Court has jurisdiction to entertain the claims submitted by the Islamic Republic in its Application and Memorial as they relate to (i) an appeal from the decision of the ICAO Council concerning the interpretation or application of the Chicago Convention under Article 84 thereof; (ii) a dispute between the Parties as to the interpretation or application of the Montreal Convention under Article 14(1) thereof; and (iii) a dispute between the Parties as to the interpretation or application of the Treaty of Amity under Article XXI(2) thereof;

3. That, on a subsidiary basis, the Preliminary Objections of the United States do not possess, in the circumstances of the case, an exclusively preliminary character within the meaning of Article 79(7) of the Rules of Court.

The Hague
9 September, 1992

Signed ______________

Mohammad K. Eshragh
Agent of the Islamic
Republic of Iran

ANNEX

THE ILLEGAL U.S. NOTAMS AND THE LACK OF COORDINATION BY U.S. FORCES WITH CIVILIAN ATS AUTHORITIES IN THE PERSIAN GULF REGION

SECTION I. Introduction

1. The United States' discussion of the NOTAMs in Annex 2 of its Preliminary Objections is devoted to presenting a defense on the merits of the case. The United States has made no attempt to relate this issue to its jurisdictional objections.

2. In making this defense on the merits, the United States is fighting a lost cause. The one issue on which the ICAO Report was absolutely clear was that the U.S. NOTAMs were illegally promulgated and did not conform to the standards applicable to NOTAMs under the Chicago Convention and its Annexes. This in itself was an acknowledgment by the Council that the United States had violated the Chicago Convention. However, in addition, in seeking by means of these illegal NOTAMs to create restricted zones around its forces operating in the Persian Gulf, the United States also violated the territorial sovereignty of the Islamic Republic, interfered with the freedom of the Islamic Republic's commerce and navigation, and endangered civil aviation. These are violations of fundamental rules and principles of customary international law which are enshrined in both the Chicago Convention and the Treaty of Amity.

3. The United States fails to mention the only direct relevance the issue of the NOTAMs has to the jurisdictional issues in this case: namely that the illegal interference by U.S. military forces in Iranian civil aviation was a clear violation of provisions of the Treaty of Amity designed to guarantee the Islamic Republic's freedom of commerce and navigation. The United States' interference with Iranian civil aviation, which culminated in the shoot-down of Flight IR 655 on 3 July 1988, is so obviously related to provisions of the Treaty of Amity that there can be no doubt about the applicability of this Treaty to the facts of this case.

4. Each of these issues will be explained in more detail below after a brief statement of the relevant facts. It is not the purpose of this presentation to give a detailed review of all the relevant issues relating to the NOTAMs but only to correct the inaccurate presentation given by the United States[1].

SECTION 2. **The Facts**

5. In January 1984, the United States issued a Notice to the States responsible for flight information services in the Persian Gulf region, including the Islamic Republic of Iran. This Notice stated that U.S. vessels in the region were taking "defensive precautions[2]", as follows:

> "Aircraft at altitudes less than 2000 ft AGL which are not cleared for approach/departure to or from a regional airport are requested to avoid approaching closer than five NM to US naval forces. It is also requested that aircraft approaching within five NM establish and maintain radio contact with US naval forces on 121.5 MHZ VHF or 243.0 MHZ UHF. Aircraft which approach within five NM at altitudes less than 2000 ft AGL whose intentions are unclear to U.S. naval forces may be held at risk by U.S. defensive measures."

6. The United States describes this document as a "U.S. Special Notice of Information" and alleges that it was provided to the relevant States "so that they could issue an appropriate NOTAM"[3]. It accuses the Islamic Republic, and other States responsible for providing air transport services in the region, of failing to comply with their obligations under the Chicago Convention and its Annexes to publish this information as a NOTAM.

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[1] A detailed exposition of the issue of the NOTAMs and the related issue of civil/military coordination was given in the Islamic Republic's Memorial. See, in particular, Part I, pp. 33-42, paras. 1.46-1.57; Part III, pp. 157-172, paras. 3.28-3.52 and Part IV, pp. 218-230, paras. 4.15-4.32.

[2] For the text of this Notice, see, U.S. Preliminary Objections, Exhibit 85.

[3] U.S. Preliminary Objections, Annex 2, p. 1 and fn. 2.

7. In fact, there is no evidence that the United States requested the States concerned to issue such a NOTAM. The United States simply issued its "U.S. Special Notice of Information". There was no request, no attempt at discussion or negotiation - simply a unilateral notification that these steps would be taken by U.S. vessels. Even if such a request had been made, the Islamic Republic had no obligation whatsoever under the Chicago Convention or its Annexes to issue the information contained in the U.S. Notice as a NOTAM. As will be seen in more detail below, no State has an obligation to issue a NOTAM on behalf of a third State (unless that third State is within its FIR), especially when the NOTAM requested is on its face illegal in nature and violative of fundamental principles of international law.

8. The result of these events was that none of the States responsible for air transport services in the region published the U.S. Notice as a NOTAM. Although the relevant information may have been relayed to airmen in the region for safety reasons, no States were prepared to recognize the U.S. actions as legal.

9. The Islamic Republic lodged a complaint with ICAO concerning this Notice on 27 February 1984[4]. This complaint stated in part as follows:

> "Reference is hereby made to the (Special Notice) issued by KDCAYN to OIIIYN, dated 220220 (January 1984) regarding restriction of overflight above certain areas of high seas in the Persian Gulf and the Sea of Oman. The Notice is a clear violation of international law and common practices regarding the freedom of flying over the high seas. It is indeed a flagrant infringement of principles laid down by the Chicago Convention on Civil Aviation as well as other Conventions regarding the Law of the Sea.
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> ...
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> The Notice which purports to claim sovereignty over undefined areas of the high seas in the Persian Gulf, Sea of Oman and

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[4] Exhibit 61 to the Memorial of the Islamic Republic.

> Arabian Sea is basically unfounded and legally invalid and unacceptable.
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> The Islamic Republic of Iran considers the Special Notice as a direct interference in the internal affairs of the Coastal States of the Persian Gulf and the Sea of Oman and threat against the safety and security of international air and sea navigation.
>
> Furthermore, due to special circumstances in the area, the Islamic Republic of Iran declares that it will continue to perform its rights and obligations, for the protection and safeguard of its national interests in the (security perimeter), zone adjacent to its territorial seas.
>
> It is, therefore, requested that appropriate measures be taken for immediate cancellation of this Notice, otherwise the United States of America will be held responsible for all consequences resulting from such violation."

10. As a result of this protest, the ICAO MIDRAN meeting, comprising States responsible for providing air transport services in the Middle East, discussed the U.S. Notice at a meeting in Montreal in 1984. Paragraph 2.6.8 of the Recommendations of this meeting called on States, as a matter of urgency, to review any restrictions "imposed in the airspace over the high seas with a view to eliminating them"[5].

11. Notwithstanding this ICAO Recommendation by the States exclusively responsible for air transport services in the region, and because States in the region had refused to promulgate the Notice as a NOTAM, on 11 January 1985 the United States reissued the Notice in the form of what it calls a "U.S. international civil NOTAM[6]" ("the U.S. NOTAM"). As will be shown in Section 3 below, there is no basis in international law for such a NOTAM, and consequently this document, like the earlier Notice, can have no legal status.

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[5] See, ICAO Working Paper C-WP/8644 (8/7/88), Addendum No. 1 (12/7/88), p. 1. Exhibit 38. See also Islamic Republic Memorial's paras. 4.29-4.34.

[6] U.S. Preliminary Objections, Annex 2, p. 3.

12. The U.S. NOTAM was updated in September 1987. The final text which was current on 3 July 1988 read in relevant part as follows:

> "Aircraft (fixed wing and helicopters) operating in these areas should maintain a listening watch on 121.5 MHZ VHF or 243.0 MHZ UHF. Unidentified aircraft, whose intentions are unclear or who are approaching U.S. naval vessels, will be contacted on these frequencies and requested to identify themselves and state their intentions as soon as they are detected. In order to avoid inadvertent confrontation, aircraft (fixed wing and helicopters) including military aircraft may be requested to remain well clear of U.S. vessels. Failure to respond to requests for identification and intentions, or to warnings, and operating in a threatening manner could place the aircraft (fixed wing and helicopters) at risk by U.S. defensive measures. Illumination of a U.S. naval vessel with a weapons fire control radar will be viewed with suspicion and could result in immediate U.S. defensive reaction. This Notice is published solely to advise that measures in self-defense are being exercised by U.S. naval forces in this region. The measures will be implemented in a manner that does not unduly interfere with the freedom of navigation and overflight".

3 This NOTAM also contained the provision that aircraft flying at altitudes ss than 2000 feet and within 5 nautical miles of a U.S. vessel, and not cleared for pproach/departure from a regional airport, could be at risk from U.S. defensive easures.

4 The Islamic Republic immediately protested against this NOTAM to CAO[8]. It also made repeated protests to both the United States, ICAO, and the N. Secretary-General concerning the interferences by U.S. forces in Iranian ommerce and navigation arising from the application of the measures set out in e NOTAM[9].

Exhibit 14 to the Memorial of the Islamic Republic.

ICAO Working Paper C-WP/8644 (8/7/88), Attachment 7. Exhibit 38.

See, Exhibits 15, 19 and 21 to the Memorial of the Islamic Republic for protests made to ICAO and the United States, respectively. See, also, Exhibit 16 hereto for protests made to the U.N. Secretary-General for distribution as Council documents.

15. The illegal nature of the NOTAMs was again raised by the Islamic Republic as forming part of the dispute before the ICAO Council concerning the shoot-down of Flight IR 655 on 3 July 1988. However, at the 13 March 1989 meeting of the Council, the United States announced that it had cancelled its NOTAM on condition that the Persian Gulf Provider States disseminated the U.S. NOTAM as "information"[10].

16. Subsequent to the 13 March 1989 meeting, the United States took steps for the first time to make a request for the issuance of the NOTAM to the ATS providers in the Persian Gulf region through the proper ICAO channels, and not by illegal unilateral actions. While ATS providers in the region have complied with this official request for safety reasons, this does not alter the fact that the NOTAM remains completely illegal in scope and, to the extent it is still in force today, continues to interfere with and endanger civil and commercial air traffic. For this reason, most ATS providers in the region including the Islamic Republic of Iran have issued this information with a clear disclaimer. Thus, the United Arab Emirates prefaced their issuance of this NOTAM with the following statement:

> "The following information originates from the United States of America and is promulgated in the interest of the safety of the flight: the promulgation does not necessarily imply endorsement of this information by the United Arab Emirates[11]."

A similar disclaimer was made by the Islamic Republic[12]. Thus, the United States' conclusion to its Annex 2, to the effect that virtually all the Persian Gulf States (including the Islamic Republic) have now issued NOTAMs "pursuant to the U.S. requests[13]", is without significance. The NOTAM has not been endorsed by these States and remains illegal in scope.

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[10] Draft C-Min. 126/18, 13 March 1989, p. 10. Exhibit 47.

[11] See, Exhibit 99.

[12] Ibid..

SECTION 3. The Illegality of the U.S. NOTAMs

17. As explained in the Islamic Republic's Memorial, under the Chicago Convention and its Annexes a large part of the globe is divided into Flight Information Regions ("FIRs") which are the exclusive responsibility of the relevant Air Transport Service ("ATS") provider in that region. No third State, and least of all the military forces of a third State, has any authority over civil aviation within another State's FIR[14]. It will be shown below that in seeking to create restrictive zones around its vessels in another State's FIR the United States was acting in violation of this principle, as well as violating other fundamental principles of international law enshrined in the Chicago Convention and the Treaty of Amity.

18. The United States alleges that in issuing its Notice in January 1984 it equested Persian Gulf States to promulgate a NOTAM containing such nformation and that these States failed to meet their obligation under the Chicago Convention to take this action. As a result, the United States argues that t was forced on 11 January 1985 to promulgate its own "U.S. international civil NOTAM".

9. It has been seen above that the United States has produced no evidence hat it requested these States to publish a NOTAM, nor any evidence that it ttempted to discuss its content in any way with such States. However, even if it

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[3] U.S. Preliminary Objections, Annex 2, p. 7.

[4] See, Memorial of the Islamic Republic, pp. 157, et seq..

had, it is appropriate to examine why it would have been rejected by the relevant States.

20. The U.S. Notice was simply a unilateral warning to aircraft to avoid flying within a certain range of any U.S. naval vessel, whether in international waters or within the territorial sea of another State, and stated that any aircraft flying within range could be at risk from U.S. defensive measures from these vessels. In effect, this meant the creation of a form of floating danger zone around any U.S. naval vessel anywhere within the region covered by the Notice, in other words anywhere in the Persian Gulf, the Strait of Hormuz, the Gulf of Oman and the Arabian Sea (north of 20 degrees north), including the territorial waters of States bordering these areas[15].

21. It is self-evident that the issue of such a Notice can have no basis whatsoever in international law:

- No State has the right to create such permanent, floating danger zones over international waters;

- Implicitly such danger zones could cover the territory and airspace of the States in the area and thus violate their exclusive and complete territorial sovereignty;

- No State has the right to create a danger zone in the Flight Information Region for which another State is exclusively responsible;

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[15] See, Memorial of the Islamic Republic, p. 224, para. 4.23.

> No State has the right to challenge or intercept civil aircraft or ask such aircraft to change their route in the manner foreseen in the U.S. Notice.

22. Moreover, the U.S. Notice was not in a form that could be promulgated as a NOTAM. Under the Chicago Convention, a NOTAM must be clear and accurate and is supposed only to cover temporary disruption or hazards to air traffic[16]. The U.S. Notice met none of these requirements. The principle behind the measures set out in the Notice was that U.S. vessels could go anywhere in the Persian Gulf region while civilian aircraft would have to take steps to avoid them. Given that civilian aircraft are on set flight plans which cannot be changed, while U.S. vessels were manoeuvering freely around the Persian Gulf, the potential for disruption is self-evident.

23. It follows from the above that the United States' argument that the Persian Gulf States violated the Chicago Convention in failing to publish their U.S. Notice as a NOTAM is wholly without merit. The U.S. Notice was illegal on its face.

24. In any event, there is no obligation in the Chicago Convention on States responsible for FIRs to issue NOTAMs on behalf of third States not within that FIR. One can imagine what the reaction of the United States would have been if third States sought to issue restrictive notices of the kind proposed by the United States within the United States' FIR.

25. As noted above, on 11 January 1985 the United States promulgated its Notice as a "U.S. international civil NOTAM" through its Washington D.C.

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[16] See, Memorial of the Islamic Republic, pp. 169, et seq.

NOTAM office. This NOTAM was updated in September 1987, and it was this NOTAM which was current when Flight IR 655 was shot down.

26. The September 1987 U.S. NOTAM was far wider in scope than the 1984 Notice. It provided that "unidentified aircraft, whose intentions are unclear or who are approaching U.S. naval vessels, will be contacted ... and requested to identify themselves as soon as they are detected[17]". This purported to extend the danger zone as far as the technology of the vessel would allow. In the case of the AEGIS system, this would be 250 nautical miles (approximately 463 kilometers) in all directions from any U.S. vessel carrying such a system.

27. Thus, the same points as made above with respect to the U.S. Notice apply a fortiori to the September 1987 U.S. NOTAM:

> First, the United States had no authority to issue a NOTAM covering FIRs which are the responsibility of another State. Thus, the NOTAM was ultra vires and had no legal status;
>
> Second, in illegally creating permanent, floating danger zones over international waters, the NOTAM interfered with the freedom of navigation;
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> Third, the NOTAM violated the territorial sovereignty of the States concerned;
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> Fourth, the procedures envisaged for challenging and directing aircraft under the NOTAM were illegal and resulted in the continuous

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[17] See, Exhibit 14 to the Memorial of the Islamic Republic (emphasis added).

interference with and endangerment of civil aviation in violation of international law;

Fifth, the U.S. NOTAM did not meet the standards applicable to NOTAMs under the Chicago Convention and its Annexes being neither temporary in nature, nor "adequate, accurate and timely[18]".

28. The illegal nature of the September 1987 U.S. NOTAM has been confirmed by ICAO. This NOTAM was discussed by ICAO at a meeting in Paris on 6 October 1988. The findings of this meeting could not be more explicit on this subject:

> "The meeting expressed its belief that this NOTAM is in contravention of approved ICAO Standards and Recommended Practices. The meeting disagreed with this practice by the United States. It stressed that the promulgation of aeronautical information is the responsibility of the appropriate ATS authority of the States which provide services in the FIRs concerned, including the airspace extending over the high seas, in accordance with relevant ICAO provisions and the Air Navigation Plan of ICAO. In the light of these circumstances, the meeting requests the Council of ICAO to urgently address this matter, and to take appropriate measures to secure the withdrawal of the referenced NOTAM[19]".

29. Referring to the problems caused to air traffic in the Persian Gulf, he meeting -

> "... again emphasized that the issuance of the NOTAM by the United States authorities (FAA NOTAM KDZZNA 056/88 dated 131429/08) is the primary cause of the problems outlined above[20]".

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[8] See, Memorial of the Islamic Republic, p. 170, para. 3.50.

[9] Exhibit 40 to the Memorial of the Islamic Republic, p. 2, para. 10.

[0] Ibid., p. 3, para. 15 (emphasis added).

30. The meeting also affirmed that "the responsibility for providing Air Traffic Services rests solely with the States concerned, both within their national airspace and that airspace over the high seas for which they have accepted responsibility[21]."

31. The ICAO Report confirms the conclusions of this meeting at paragraph 2.2.4. It found that the NOTAM was illegally promulgated:

> "Aeronautical information service authority. In accordance with the provisions of ICAO Annex 15, ICAO Contracting States provided an aeronautical information service and published aeronautical information concerning the territory of the State as well as areas outside its territory in which the State was responsible for air traffic services. International NOTAM offices were designated by States for the international exchange of NOTAMs in accordance with the ICAO regional air navigation plans. The United States NOTAM concerning the [Persian] Gulf, Strait of Hormuz, Gulf of Oman and Arabian Sea covered an area within the responsibility of International NOTAM Offices Abu Dhabi, Baghdad, Bahrain, Bombay, Karachi, Kuwait, Muscat and Tehran. Therefore, the promulgation of the NOTAM is not in conformity with the provisions of ICAO Annex 15[22]."

32. The ICAO Report also found that the NOTAM was unclear:

> "The full implications of the rules of engagement of the United States warships were not sufficiently reflected in the notice promulgated by the United States. It was not specified what was considered to be 'operating in a threatening manner', what distance was considered 'well clear of United States warships', and what was meant with 'could place the aircraft at risk by United States defensive measures'. The safety risks imposed by the presence of naval forces in the [Persian] Gulf area to civil aviation may have been underestimated, in particular as civil aircraft operated on promulgated tracks including standard approach and departure routes from airports in the area[23]."

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[21] Ibid, p. 3, para. 12.

[22] ICAO Report, para. 2.2.4 (emphasis added). Exhibit 4 to the Memorial o the Islamic Republic

[23] Ibid., para. 2.2.5.

33. It is highly relevant that the U.S. Defense Department itself has condemned its own warnings made pursuant to the NOTAM as unclear. As stated in the Defense Department Report:

> "The current verbal warnings issued by CJTFME [Commander Joint Task Force Middle East] units do not clearly identify exactly which aircraft the ship is attempting to contact[24]."

34. The conclusions of the ICAO Report further confirm this. Not only did the Report conclude that "(t)he presence and activities of naval forces in the [Persian] Gulf area have caused numerous problems to international civil aviation[25]", it also stated:

> "Civil aviation requirements such as airways, standard approach and departure procedures, and the fixed tracks used by helicopters to oil rigs were not a consideration in warship positioning. This resulted in warships challenging civil aircraft often in critical phases of flight, i.e. during approach to land and during initial climb. In the absence of a clear method of addressing challenged civil aircraft, such challenges were, on occasion, mistaken by pilots to whom the challenge was not addressed, causing additional confusion and danger[26]."

SECTION 4. The Consequences of the Illegal U.S. NOTAMs

35. The typical practice of the United States in the Persian Gulf was to challenge virtually every aircraft that came even remotely close to its warships. This resulted in continuous interference with and endangerment of civil aviation traffic in the region. Many of the resulting incidents have been well documented, and repeated protests were made by the Islamic Republic to ICAO, the United

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[24] Defense Department Report, p. E-18 (emphasis added). Exhibit 4 to the Memorial of the Islamic Republic.

[25] ICAO Report, para. 2.3.1. Exhibit 4 to the Memorial of the Islamic Republic.

[26] Ibid., para. 2.3.2.

States and the U.N. Secretary-General for distribution as Security Council documents on this subject[27].

36. These interferences in civil aviation were violations of both the Chicago Convention and the Treaty of Amity. However, the most serious consequence of the NOTAMs and the measures taken by U.S. forces pursuant to the NOTAMs was the shoot-down of Flight IR 655.

37. In considering the U.S. forces' application of its NOTAM on 3 July 1988 one can appreciate why such measures are prohibited under international law:

> First, the United States' forces applied the NOTAM against a civilian aircraft cleared for take-off from an international airport, while that aircraft was still flying over the territory of the Islamic Republic;
>
> Second, the United States' forces applied the NOTAM improperly given that they were violating the Islamic Republic's territorial sovereignty at the time; and
>
> Third, the United States issued illegal warnings and challenges to Flight IR 655 pursuant to the NOTAM although there is no basis in international law for challenging civilian aircraft in such a manner.

38. The Vincennes failed even to abide by the conditions for engagement set out in its own NOTAM. Under the NOTAM that had been issued by the United

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[27] See, Memorial of the Islamic Republic, pp. 33-42. See, also, Exhibits 15, 19 and 21 thereto for protests made to ICAO and the United States and Exhibit 16 to these Observations for protests made to the Security Council for distribution as Security Council documents.

States, aircraft approaching a U.S. warship were only supposed to be at risk of "defensive measures" (i) if they had not been cleared for take-off from a regional airport, and (ii) if they came within 5 nautical miles of a warship at an altitude of less than 2000 feet. In this case, the interception of IR 655 took place at a distance of 10 nautical miles from the Vincennes and at a height of 12,950 feet. Not only was this outside the lateral and vertical limits appearing in the NOTAM, but Flight IR 655 was also a flight "cleared" to depart from a regional airport to which the NOTAM purported not to apply. Thus, under the terms of the United States' own NOTAM, there was no justification for the attack.

39. As explained in paragraph 16 above, this NOTAM (albeit in a revised form) is still being imposed on the ATS providers in the Persian Gulf region by the United States. A number of these States have refused to endorse the NOTAM because of its illegal nature and it has only been promulgated by these States for safety reasons. The Islamic Republic has continued to protest the illegal nature of the NOTAM since the incident of 3 July 1988 and continues to seek its removal.

SECTION 5. **The U.S. Forces' Total Failure to Coordinate their Activities with Civilian ATS Authorities in the Persian Gulf Region**

40. The United States ends its discussion of the NOTAMs by alleging that the disruption of civilian air traffic in the Persian Gulf was caused by the Iran-Iraq war and by the failure of countries such as the Islamic Republic "to establish and maintain close cooperation with foreign military authorities in the [Persian] Gulf responsible for activities that could affect civil aviation[28]". In the footnote to this statement, the United States suggests that under the Chicago Convention the

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[28] U.S. Preliminary Objections, Annex 2, p. 6.

burden is on civilian authorities to coordinate their activities with military authorities[29].

41. It is certainly true that the war imposed on the Islamic Republic by Iraq together with the attacks on neutral shipping initiated by Iraq in 1980 disrupted commercial navigation in the Persian Gulf region. However, as explained in Part II of these Observations, the responsibility for the consequent disruption of air traffic lay entirely with Iraq.

42. In any event, steps had been taken by the Islamic Republic and other ATS providers in the region to control this situation and to ensure that civil aviation kept clear of the area of hostilities between Iraq and the Islamic Republic. It was only the presence of the United States' forces in the Persian Gulf and their failure to coordinate with the ATS providers in the region which disrupted this situation and resulted in the interference with and endangerment of civilian air traffic.

43. The United States is entirely wrong when it implies that the burden was on countries in the Persian Gulf to maintain and establish close cooperation with military forces in the Persian Gulf. The provision of the Chicago Convention to which the United States refers on this point is related to military forces within a State's own FIR, not to the military forces of a third State. The military forces of a third State must obviously have the obligation to initiate cooperation when acting within another State's FIR and must accept the authority of the ATS provider in that FIR.

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[29] Ibid., fn. 2.

44. This point is confirmed by the ICAO Report. It found conclusively that -

> "There was no coordination between United States warships and the civil ATS units responsible for the provision of air traffic services within the various flight information regions in the [Persian] Gulf area[30]".

45. The Safety Recommendations of the ICAO Report clearly show that the burden was on the United States in this regard, holding that -

> "a) Military forces should, initially through their appropriate State authorities, liaise with States and ATS units in the area concerned.
>
> b) Military forces should be fully informed on the extent of all promulgated routes, types of airspace, and relevant regulations and restrictions[31]".

These findings were confirmed in the ANC's report on the incident to the Council, which itself was endorsed by the Council in its final decision on 17 March 1989[32].

46. The United States made no attempt whatsoever to take such steps. It failed to inform ATS providers of the movements of its vessels and made no attempt to establish a communication link with ATS providers. This failure, combined with the illegal NOTAMs, was a direct cause of the shooting down of Flight IR 655 and in itself constituted a violation of both the Chicago Convention and the Treaty of Amity.

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[30] ICAO Report, para. 2.8.4. Exhibit 4 to the Memorial of the Islamic Republic.

[31] Ibid., para. 4.1.

[32] C-Dec 126/20, 17 March 1989. Exhibit 50.

LIST OF EXHIBITS [1]

Exhibit	
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[1] Not reproduced. *[Note by the Registry.]*

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100	Certification.

OBSERVATIONS OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

OBSERVATIONS DE L'ORGANISATION DE L'AVIATION CIVILE INTERNATIONALE

LETTER FROM THE SECRETARY GENERAL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

4 December 1992.

Re: Aerial Incident of 3 July 1988
(Islamic Republic of Iran v. United States of America)

I refer to your letter of 16 September 1992 in which you informed me that the President of the International Court of Justice had fixed 9 December 1992 as the time-limit within which the International Civil Aviation Organization (ICAO) may submit to the Court its observations in writing, should the ICAO Council wish to do so.

Please find attached herewith the observations of the ICAO Council in the English[1], French[2], Russian[3] and Spanish[3] languages.

(*Signed*) Philippe ROCHAT.

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[1] Pp. 619-622, *infra*.
[2] Ci-après pp. 623-627.
[3] Not reproduced. [*Note by the Registry.*]

INTRODUCTION

The Convention on International Civil Aviation (Chicago, 1944, Doc 7300/6) has vested the ICAO Council with important functions for the settlement of disputes relating to the Chicago Convention and Annexes. Chapter XVIII (Disputes and default) of the Convention (Articles 84 to 88) deals with the settlement of disagreements and Article 84 states that "If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council." A decision rendered by the Council in a dispute submitted under Article 84 of the Convention is appealable by the parties either to an ad hoc arbitral tribunal or to the ICJ. Furthermore, the functions to be assumed by the Council under Chapter XVIII are governed by the Rules for the Settlement of Differences approved by the Council on 9 April 1957 and amended on 10 November 1975 (Doc 7782/2).

According to the records of the International Civil Aviation Organization there have been only three cases considered by the ICAO Council under Chapter XVIII of the Chicago Convention: dispute between India and Pakistan (1952); dispute between the United Kingdom and Spain (1969); disagreement and complaint by Pakistan against India (1971).

A matter which could be submitted to the Council under Chapter XVIII may also be referred to the Council under Articles 54 and 55 of the Convention which does not involve proceedings under Article 84. The Convention does not envisage that decisions and recommendations of the Council taken otherwise than under Chapter XVIII may be referred to the International Court of Justice.

FACTUAL INFORMATION REGARDING THE PROCEEDINGS IN THE ICAO COUNCIL FOLLOWING THE DESTRUCTION OF THE IRAN AIR AIRBUS A300 FLIGHT NO. IR655

1. The President of the ICAO Council received telex messages dated 3 and 4 July 1988 from the authorities of the Islamic Republic of Iran concerning the destruction, on 3 July 1988, of an Iran Air Airbus A300 flight No. IR655 from Bandar Abbas to Dubai which resulted in the loss of 290 lives. A telex message dated 4 July 1988 "urgently requested that this grave matter be tabled in the ICAO Council as a matter of urgency." An Extraordinary Session of the Council to consider the request by the Islamic Republic of Iran was convened on 13 July 1988 and the Islamic Republic of Iran was invited to participate in the consideration of this subject in accordance with Article 53 of the Convention on International Civil Aviation and Rule 32 of the Rules of Procedure for the Council.

2. The Extraordinary Session of the Council was held on 13 and 14 July 1988 and the request from the Government of the Islamic Republic of Iran was considered under subject No. 14: Subjects relating to air navigation (as listed in the Council Subject List, Doc 6908-C/181, 10th Revision, 11/6/87). As a result of its deliberations, the Council approved as its decision the statement by the President of the Council which is attached hereto (Attachment A).

3. A Report of the fact-finding investigation instituted in accordance with the decision referred to in paragraph 2 above, was considered by the Council at the 12th, 13th and 14th Meetings of its 125th Session on 5 and 7 December 1988. During the 12th Meeting, the Delegation of the Government of the Islamic Republic of Iran requested that the attention of the Council and its determination be focused on the following:

- Condemnation of the shooting down of IR655 by the United States military forces in the Persian Gulf.

- Explicit recognition of a crime of international character to the breach of international law and legal duties of a Contracting State of ICAO.

- Explicit recognition of the responsibilities of the United States Government, and calling for effecting compensation for moral and financial damages.

- Demand for the immediate termination of present obstacles, restrictions, threats, and the use of force against civilian aircraft in the region, including Council's appeal to relevant international bodies to demand the withdrawal of all foreign forces from the Persian Gulf.

As a result of its deliberations, the Council, on 7 December 1988, took the decision which is attached hereto (Attachment B).

4. On 13, 15 and 17 March 1989, the Council considered the Report of the investigation team. As a result of its deliberations, the Council adopted, on 17 March 1989, a resolution, the text of which is attached hereto (Attachment C).

CONCLUSION

The request from the Government of the Islamic Republic of Iran submitted to the Extraordinary Session of the Council held on 13 and 14 July 1988 did not make any reference to Article 84 of the Convention on International Civil Aviation. Consequently, the request was not considered under the procedure outlined in Chapter XVIII of that Convention and in accordance with the Rules for Settlement of Differences. Furthermore, the matter was not considered by the Council under subject No. 26: Settlement of disputes between contracting States (as listed in the Council Subject List, Doc 6808-C/181, 10th Revision, 11/6/87).

It must therefore be concluded that the request by the Islamic Republic of Iran was considered under other provisions of the Convention on International Civil Aviation, in particular Articles 54 and 55.

ATTACHMENT A

THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO), AT ITS EXTRAORDINARY SESSION HELD ON 13 AND 14 JULY 1988, APPROVED AS ITS DECISION THE FOLLOWING STATEMENT BY THE PRESIDENT OF THE COUNCIL

1) The Council duly considered the request by the Islamic Republic of Iran concerning the shooting down, on 3 July 1988, of Iran Air Airbus A300 on flight IR655;

2) the Council expressed profound regret over the loss of 290 lives;

3) the Council expressed its deepest sympathy and condolences to the Government of the Islamic Republic of Iran and to the bereaved families of the victims of this tragic event;

4) the Council deplored the use of weapons against a civil aircraft;

5) the Council reaffirmed the fundamental principle that States must refrain from resorting to the use of weapons against civil aircraft; it also appealed to all States which have not yet done so to ratify, as soon as possible, the Protocol introducing Article 3 *bis* into the Convention on International Civil Aviation; it also strongly urged all States to refrain from any action which might jeopardize the safety of civil aviation in the area;

6) the Council directed the Secretary General to institute an immediate fact-finding investigation to determine all relevant facts and technical aspects of the chain of events relating to the flight and destruction of the aircraft;

7) the Council urged all parties concerned to co-operate fully in the investigation;

8) the President of the Council and the Secretary General should present a full report to the Council as early as possible during the 125th Session of the Council in September 1988;

9) the Council directed the President of the Council and the Secretary General:

   (a) to continue their efforts with all States concerned for the earliest possible establishment of suitable arrangements for the proper co-ordination of civil flight operations and military activities within the area so as to fully safeguard the safety of civil air navigation;

   (b) to take all necessary measures, in co-operation with the States concerned, to improve the routing arrangements in the area so as to facilitate safe operation of civil air traffic;

   (c) to undertake immediately all necessary studies for the improvement of the Standards and Recommended Practices to prevent the recurrence of such a tragic incident;

   (d) the President of the Council and the Secretary General should report to the Council on the implementation of (a), (b) and (c) above as soon as possible.

ATTACHMENT E

DECISION OF THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

On the basis of the summary of the President of the Council, the Council of ICAO, at the 14th Meeting (Closed) of the 125th Session on 7 December 1988, took the following decision:

THE COUNCIL:

1. Recalled its decision of 14 July 1988 adopted at its Extraordinary Session concerning the shooting down, on 3 July 1988, of Iran Air Airbus A300 on flight IR655;

2. Received the report of the fact-finding investigation instituted by the Secretary General pursuant to that decision of the ICAO Council;

3. Recognized with appreciation that all parties concerned cooperated fully in this investigation;

4. Expressed again its profound regret over the loss of 290 lives and its deep sympathy and condolences to the Government of the Islamic Republic of Iran and to the bereaved families of the victims of this tragic event;

5. Urged all States to take all necessary action for the safety of navigation of civil aircraft, particularly by assuring effective co-ordination of civil and military activities;

6. Reaffirmed again the fundamental principle of general international law that States must refrain from resorting to the use of weapons against civil aircraft;

7. Appealed urgently to all States which have not yet done so to ratify, as soon as possible, the Protocol introducing Article 3 _bis_ into the Convention on International Civil Aviation;

8. Instructed the Air Navigation Commission to study the safety recommendations contained in the report of the fact-finding investigation and to report to the 126th Session of the Council on any measures it considers necessary so as to prevent the recurrence of a similar tragic event;

9. Directed the Air Navigation Commission to examine, upon their completion, the results of the studies undertaken under paragraph 4(c) of the Council decision of 14 July 1988;

10. Decided that C-WP/8708 no longer has a restricted character; and

11. Decided to include the Report of investigation as required in the Council decision of 14 July 1988 in the Work Programme of the 126th Session of the Council.

ATTACHMENT C

RESOLUTION ADOPTED BY THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION AT THE 20TH MEETING OF ITS 126TH SESSION ON 17 MARCH 1989

THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

Recalling its decisions of 14 July and 7 December 1988 concerning the shooting down, on 3 July 1988, of Iran Air Airbus 300 on flight IR655 by a warship of the United States;

Having considered the report of the fact-finding investigation instituted by the Secretary General pursuant to the decision of the Council of 14 July 1988 and the subsequent study by the Air Navigation Commission of the safety recommendations presented in that report;

Expressing appreciation for the full co-operation extended to the fact-finding mission by the authorities of all States concerned;

Recalling that the 25th Session (Extraordinary) of the Assembly in 1984 unanimously recognized the duty of States to refrain from the use of weapons against civil aircraft in flight;

Reaffirming its policy to condemn the use of weapons against civil aircraft in flight without prejudice to the provisions of the Charter of the United Nations;

Deeply deplores the tragic incident which occurred as a consequence of events and errors in identification of the aircraft which resulted in the accidental destruction of an Iran Air airliner and the loss of 290 lives;

Expresses again its profound sympathy and condolences to the Government of the Islamic Republic of Iran and to the bereaved families;

Appeals again urgently to all Contracting States which have not yet done so to ratify, as soon as possible, the Protocol introducing Article 3 *bis* into the Convention on International Civil Aviation;

Notes the report of the fact-finding investigation instituted by the Secretary General and endorses the conclusions of the Air Navigation Commission on the safety recommendations contained therein;

Urges States to take all necessary measures to safeguard the safety of air navigation, particularly by assuring effective co-ordination of civil and military activities and the proper identification of civil aircraft.

– END –

INTRODUCTION

La Convention relative à l'aviation civile internationale (Chicago, 1944, Doc 7300/6) confie au Conseil de l'OACI des fonctions importantes en vue du règlement des différends concernant la Convention de Chicago et ses Annexes. Le Chapitre XVIII (Différends et manquements) de la Convention (articles 84 à 88) traite du règlement des désaccords, l'article 84 stipulant en particulier que «Si un désaccord entre deux ou plusieurs États contractants à propos de l'interprétation ou de l'application de la présente Convention et de ses Annexes ne peut être réglé par voie de négociation, le Conseil statue à la requête de tout État impliqué dans ce désaccord.» Les parties peuvent appeler à un tribunal d'arbitrage *ad hoc* ou à la Cour permanente de justice internationale, d'une décision rendue par le Conseil au titre de l'article 84 de la Convention. D'autre part, les fonctions à assumer par le Conseil aux termes du Chapitre XVIII sont régies par les dispositions du Règlement pour la solution des différends, approuvé par le Conseil le 9 avril 1957 et amendé le 10 novembre 1975 (Doc 7782/2).

D'après les annales de l'Organisation de l'aviation civile internationale, le Conseil de l'OACI n'a été saisi que de trois cas aux termes du Chapitre XVIII de la Convention; il s'agit du différend entre l'Inde et le Pakistan (1952), du différend entre le Royaume-Uni et l'Espagne (1969), du désaccord et de la plainte déposée par le Pakistan contre l'Inde (1971).

Une question pouvant être soumise au Conseil au titre du Chapitre XVIII peut l'être aussi aux termes des articles 54 et 55 de la Convention si elle n'implique pas les démarches décrites à l'article 84. En effet, la Convention ne prévoit pas l'éventualité que les décisions et recommandations adoptées par le Conseil à un autre titre que celui du Chapitre XVIII puissent être renvoyées à Cour internationale de justice.

NARRATION DES FAITS CONCERNANT LES TRAVAUX DU CONSEIL À LA SUITE DE LA DESTRUCTION DE L'AIRBUS A300 D'IRAN AIR ASSURANT LE VOL N° IR655

Le Président du Conseil de l'OACI a reçu des messages par télex en date du 3 et 4 juillet 1988, envoyés par les autorités de la République islamique d'Iran, concernant la destruction, le 3 juillet 1988, d'un Airbus A300 d'Iran Air assurant le vol n° IR655 de Bandar-Abbas à Dubaï, qui a entraîné la perte de 290 vies humaines. Un autre télex daté du 4 juillet 1988 demandait «instamment que le Conseil de l'OACI soit saisi d'urgence de cette grave question». Une session extraordinaire du Conseil a été convoquée le 13 juillet 1988 pour examiner la demande de la République islamique d'Iran, cette dernière étant invitée à participer à l'examen de la question en application de l'article 53 de la Convention relative à l'aviation civile internationale et de la règle 32 du Règlement intérieur du Conseil.

La session extraordinaire du Conseil s'est tenue les 13 et 14 juillet 1988, et la demande du Gouvernement de la République islamique d'Iran a été examinée au titre de la question 14 : Questions de navigation aérienne (Liste des questions du Conseil, Doc 6908-C/181, 10e révision, 11/6/87). À l'issue de ses délibérations, le Conseil a adopté comme sa propre décision la déclaration du Président du Conseil, dont le texte est reproduit ci-joint (Pièce jointe A).

3. Le Conseil a examiné le rapport de l'enquête instituée en application de la décision mentionnée au paragraphe 2 ci-dessus au cours des douzième, treizième et quatorzième séances de sa 125ᵉ session, les 5 et 7 décembre 1988. Lors de la douzième séance, la délégation du Gouvernement de la République islamique d'Iran a demandé au Conseil de concentrer son attention et ses délibérations sur les aspects suivants :

- Condamnation de la destruction du vol IR655 par les forces militaires des États-Unis dans le golfe Persique.
- Reconnaissance expresse d'un délit de caractère international constituant une violation du droit international et des obligations juridiques d'un État contractant de l'OACI.
- Reconnaissance expresse de la responsabilité du Gouvernement des États-Unis et demande d'indemnisation des dommages moraux et financiers.
- Obligation de lever immédiatement les obstacles et de mettre sans tarder un terme aux restrictions et menaces actuelles ainsi qu'au recours à la force contre les aéronefs civils dans la région, y compris appel du Conseil aux organismes internationaux pertinents pour exiger le retrait de toutes les forces étrangères du golfe Persique.

À la suite de ses délibérations, le 7 décembre 1988, le Conseil a pris la décision qui figure à la Pièce jointe B.

4. Les 13, 15 et 17 mars 1989, le Conseil a examiné le rapport de l'équipe d'enquête. Après examen, le Conseil a adopté le 17 mars 1989 une résolution dont le texte figure à la Pièce jointe C.

CONCLUSION

– La demande du Gouvernement de la République islamique d'Iran présentée à la session extraordinaire du Conseil qui s'est tenue les 13 et 14 juillet 1988 ne faisait pas référence à l'article 84 de la Convention relative à l'aviation civile internationale. En conséquence, elle n'a pas été examinée dans le cadre de la procédure décrite au Chapitre XVIII de cette Convention et conformément au Règlement pour la solution des différends. En outre, cette demande n'a pas été examinée par le Conseil au titre de la question n° 26 : Règlement des différends entre États contractants (Liste des questions du Conseil, Doc 6908-C/181, 10ᵉ révision, 11/6/87).

– Il faut donc conclure que la demande de la République islamique d'Iran a été examinée au titre d'autres dispositions de la Convention relative à l'aviation civile internationale, en particulier ses articles 54 et 55.

PIÈCE JOINTE A

LE CONSEIL DE L'ORGANISATION DE L'AVIATION CIVILE INTERNATIONALE (OACI), SIÉGEANT EN SESSION EXTRAORDINAIRE LES 13 ET 14 JUILLET 1988, A APPROUVÉ COMME DÉCISION LA DÉCLARATION CI-APRÈS DU PRÉSIDENT DU CONSEIL

Le Conseil a dûment examiné la demande présentée par la République islamique d'Iran au sujet de l'Airbus A300 d'Iran Air qui effectuait le vol IR 655 et qui a été abattu le 3 juillet 1988;

le Conseil a exprimé ses profonds regrets au sujet de la perte de 290 vies humaines;

le Conseil a exprimé ses plus sincères condoléances au gouvernement de la République islamique d'Iran et aux familles endeuillées des victimes de ce tragique incident;

le Conseil a déploré l'emploi d'armes contre un aéronef civil;

le Conseil a réaffirmé le principe fondamental selon lequel les États doivent s'abstenir de recourir à l'emploi des armes contre les aéronefs civils; il a également lancé un appel à tous les États qui ne l'ont pas encore fait pour qu'ils ratifient dès que possible le Protocole ajoutant l'article 3 bis à la Convention relative à l'Aviation civile internationale; il a aussi prié instamment tous les États de s'abstenir de tout acte qui risquerait de compromettre la sécurité de l'aviation civile dans la région;

le Conseil a chargé le Secrétaire général d'instituer immédiatement une enquête pour déterminer tous les faits pertinents et les aspects techniques de la chaîne des événements relatifs au vol et à la destruction de l'avion;

le Conseil a demandé instamment à toutes les parties intéressées de coopérer pleinement à l'enquête;

le Président du Conseil et le Secrétaire général doivent présenter un rapport complet au Conseil dès que possible pendant la 125ème session du Conseil en septembre 1988;

le Conseil a chargé le Président du Conseil et le Secrétaire général :

a) de poursuivre leurs efforts auprès de tous les États intéressés pour que soient prises le plus tôt possible des dispositions en vue d'assurer la coordination voulue entre les vols civils et les activités militaires dans la région, de manière à préserver entièrement la sécurité de la navigation aérienne civile;

b) de prendre toutes les mesures nécessaires, en coopération avec les États intéressés, pour améliorer les dispositions relatives aux itinéraires dans la région, de manière à faciliter la sécurité de la circulation aérienne civile;

c) d'entreprendre immédiatement toutes les études nécessaires pour améliorer les normes et les pratiques recommandées, de façon à éviter qu'une pareille tragédie ne se reproduise;

d) de lui faire rapport dès que possible sur l'exécution des points énoncés en a), b) et c).

PIÈCE JOINTE B

DÉCISION DU CONSEIL DE L'ORGANISATION DE L'AVIATION CIVILE INTERNATIONALE (OACI)

Sur la base du résumé du Président du Conseil, à la quatorzième séance (huis clos) de la 125ème session, le 7 décembre 1988, le Conseil de l'OACI a pris la décision suivante :

LE CONSEIL :

1. A rappelé la décision qu'il avait adoptée le 14 juillet 1988 lors d'une session extraordinaire consacrée à la question de l'Airbus A300 d'Iran Air effectuant le vol IR655 et abattu le 3 juillet 1988;

2. A reçu le rapport de l'enquête instituée par le Secrétaire général en application de cette décision du Conseil de l'OACI;

3. A reconnu avec satisfaction que toutes les parties intéressées ont coopér pleinement à l'enquête;

4. A exprimé à nouveau ses profonds regrets au sujet de la perte de 290 vies humaines ainsi que ses plus sincères condoléances au Gouvernement de la République islamique d'Iran et aux familles endeuillées des victimes de c tragique incident;

5. A prié instamment tous les États de prendre toutes les mesures nécessaire à la sécurité de la navigation des aéronefs civils, en particulier en assurant une coordination efficace des activités civiles et des activités militaires;

6. A réaffirmé à nouveau le principe fondamental du droit international général selon lequel les États doivent s'abstenir de recourir à l'emplo des armes contre les aéronefs civils;

7. A lancé un appel urgent à tous les États qui ne l'ont pas encore fait pou qu'ils ratifient dès que possible le Protocole ajoutant l'article 3 *bis* à la Convention relative à l'Aviation civile internationale;

8. A chargé la Commission de navigation aérienne d'étudier les recommandations relatives à la sécurité qui figurent dans le rapport de l'enquête et de lui faire rapport à sa 126ème session sur les mesures qu'elle juge nécessaires pour éviter qu'une pareille tragédie ne se reproduise;

9. A chargé la Commission de navigation aérienne d'examiner les résultats d études entreprises en application du paragraphe 9, alinéa c) de la décision du Conseil du 14 juillet 1988, dès que ces études auront été achevées;

10. A décidé que la note C-WP/8708 n'est plus un document à diffusion restreinte;

11. A décidé d'inscrire le rapport d'enquête demandé dans sa décision du 14 juillet 1988 au programme de travail de sa 126ème session.

PIÈCE JOINTE C

RÉSOLUTION ADOPTÉE PAR LE CONSEIL DE L'ORGANISATION DE L'AVIATION CIVILE INTERNATIONALE À LA 20e SÉANCE DE SA 126e SESSION LE 17 MARS 1989

LE CONSEIL DE L'ORGANISATION DE L'AVIATION CIVILE INTERNATIONALE,

Rappelant ses décisions des 14 juillet et 7 décembre 1988 au sujet de l'Airbus A300 d'Iran Air qui a été abattu, le 3 juillet 1988, par un navire de guerre des États-Unis alors qu'il effectuait le vol IR655,

Ayant examiné le rapport de l'enquête instituée par le Secrétaire général en application de sa décision du 14 juillet 1988, ainsi que l'étude faite ultérieurement par la Commission de navigation aérienne des recommandations relatives à la sécurité présentées dans ce rapport,

Exprimant sa reconnaissance pour la pleine coopération que les autorités de tous les États intéressés ont accordée à la mission chargée de l'enquête,

Rappelant qu'en 1984, à sa 25e session (extraordinaire), l'Assemblée a reconnu à l'unanimité que les États ont le devoir de s'abstenir de recourir à l'emploi des armes contre les aéronefs civils en vol,

Réaffirmant sa politique de condamner l'emploi des armes contre les aéronefs civils en vol, sans préjudice des dispositions de la Charte des Nations Unies,

Déplore profondément l'incident tragique survenu en conséquence d'événements et d'erreurs lors de l'identification de l'avion, qui ont abouti à la destruction accidentelle d'un avion de ligne d'Iran Air et à la perte de 290 vies humaines;

Exprime à nouveau ses plus sincères condoléances au Gouvernement de la République islamique d'Iran et aux familles endeuillées;

Lance à nouveau un appel urgent à tous les États contractants qui ne l'ont pas encore fait pour qu'ils ratifient dès que possible le Protocole ajoutant l'article 3 bis à la Convention relative à l'Aviation civile internationale;

Prend note du rapport de l'enquête instituée par le Secrétaire général et fait siennes les conclusions de la Commission de navigation aérienne au sujet des recommandations relatives à la sécurité qui y figurent;

Prie instamment les États de prendre toutes les mesures nécessaires pour préserver la sécurité de la navigation aérienne, particulièrement en assurant une coordination efficace des activités civiles et des activités militaires ainsi que l'identification précise des aéronefs civils.

— FIN —

CORRESPONDENCE

CORRESPONDANCE

1. THE AGENT OF THE UNITED STATES OF AMERICA TO THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

26 September 1989.

I refer to the Application[1] submitted to the Court on May 17, 1989, by the Government of the Islamic Republic of Iran. At your meeting with the Agents on September 12, 1989, you asked the United States to submit a letter explaining the legal basis for the submission and decision of preliminary objections prior to the filing of the Memorial, as well as any other comments the United States may have on the desirability of the sequence it had suggested for addressing preliminary objections. Without prejudice to the rights enjoyed by the Government of the United States, I wish to provide the following views.

The Statute and the Rules of the Court provide a legal basis for the submission and decision by the Court of preliminary objections prior to the Memorial.

The power and obligation of the Court to address its jurisdiction at a preliminary stage of the proceedings can be found in Articles 36 and 53 of the Statute. Pursuant to Article 36, the Court is empowered and obligated to determine its jurisdiction in the event of a dispute as to that jurisdiction. Article 53 of the Statute, which addresses a case in which one party has not appeared or has failed to defend its case, implicitly recognizes this power and obligation. It provides that before reaching a decision on the merits in such circumstances, the Court must satisfy itself that it has jurisdiction. As a previous member of this Court has said, "This requirement must apply *a fortiori* when a case is defended and a preliminary objection has been filed." Eduardo Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", 67 *American Journal of International Law* 12 (1973).

The Rules of Court deal more directly with the authority and obligation of the Court to address an objection to its jurisdiction or the admissibility of the Application prior to a Memorial. Article 79 of the Rules provides for the filing of an objection within the time limit fixed for the delivery of the Counter-Memorial and, upon receipt by the Registry of a preliminary objection, requires the suspension of the proceedings on the merits and the fixing of the time limit within which the other party may present a written statement of its observations and submissions. It further provides that after hearing the parties, the Court shall give its decision in the form of a judgment.

According to a plain reading of the words of Article 79, a party is authorized to file objections at any time after the filing of an Application through the time fixed for the filing of the Counter-Memorial. Thus, while Article 79 establishes an outside time limit for the filing of an objection, within that limit it leaves the Respondent free to determine whether and, if so, when to file an objection. Apparently this was the understanding of the Court when it considered the 1972 revisions to the Rules. Thus at that time the suggestion was made that the Respondent be required to file its objections as soon as it receives the Application; this was rejected on the ground that such a requirement might adversely affect the Respondent's right of defence. Jiménez de Aréchaga, *supra*, 19.

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[1] I, pp. [illegible]

A plain reading of the provisions in Article 79 requiring the Court upon receipt of a preliminary objection to suspend proceedings on the merits and render a decision on that objection provides the authority and the obligation of the Court to make a positive finding regarding its jurisdiction even before the Memorial has been filed.

Finally, with regard both to the time limit for filing preliminary objections and the obligation of the Court to address those objections before the submission of the Memorial, the United States understanding of the requirements of Article 79 is consistent with the purpose of the 1972 revisions which, as described by one of the principal participants in that process, was to "regulate preliminary objections so as to settle them as soon as feasible". Jiménez de Aréchaga, *supra*, 1.

While the United States recognizes that the Court has not previously addressed a preliminary objection prior to the Memorial without the consent of the Applicant, there is nothing in the practice of the Court contrary to the United States reading of Article 79. (Proceedings relating to requests for interim measures, which require only a prima facie showing of a basis on which jurisdiction might be founded, are to be distinguished for the present purposes from proceedings relating to the question of the Court's jurisdiction to hear the case, as under Article 79, or the merits.) Indeed, it appears that during its consideration of the 1972 revisions to the Rules, the Court assumed that preliminary objections could be filed at any time, but that the Respondent would not normally be in a position to file such objections before studying the Memorial. Jiménez de Aréchaga, *supra*, 19.

The United States believes that it is desirable for the Court to address objections filed before the Memorial as provided in Article 79 not only because that is in keeping with the plain meaning and purpose of that Article, but also because it serves the interest of sound administration of justice. If the Respondent has identified preliminary objections that may dispose of the case on the basis of the Application alone, there is no reason that the Respondent should be required to wait until the Memorial for the Court to address such objections.

Moreover, consideration of the preliminary objections prior to the Memorial would not prejudice the Applicant. The statements of law and fact contained in the pleadings and statements and evidence adduced at oral hearings on the objections must be confined to those matters that are relevant to the objection, so there is no risk that the Applicant's case on the merits will be prejudiced. If, on the other hand, it develops that a decision on the objection would be so inextricably intertwined with the merits that it would involve an examination of the whole of the case, the Court would declare that the objection does not possess an exclusively preliminary character. Indeed, as we previously indicated, the Court recognized when it revised the rules that it is only the Respondent that might be prejudiced by the submission and a decision on objections before the Memorial.

The United States has stated its present intention to file preliminary objections in this case prior to the submission by Iran of its Memorial. As we stated then, in accordance with Article 79 of the Rules of Court, we will at the time of our submission request that the proceedings on the merits be suspended pending a decision by the Court on those preliminary objections, following the submission of written pleadings and a hearing in that matter.

(*Signed*) Abraham D. SOFAER.

2. THE AGENT OF THE ISLAMIC REPUBLIC OF IRAN TO THE PRESIDENT

19 Mehr 1368
11 October 1989.

I refer to the Application instituting proceedings[1] in the case concerning *Aerial Incident of 3 July 1988* or in fact *Shooting Down of a Civilian Airliner over the Persian Gulf (IRI v. USA)* submitted to the Court on 17 May 1989 and entered on the Court's General List No. 79. At your meeting with the Agents on 12 September 1989 you asked the Islamic Republic to submit a letter in response to the Respondent's letter, dated 26 and received on 27 September 1989, explaining the legal basis for submission of the Applicant's Memorial prior to the filing of preliminary objections by the Respondent, as well as any other comments the Applicant may have on the desirability of the sequence it had suggested for addressing preliminary objections. Without prejudice to the rights enjoyed by the Government of the Islamic Republic of Iran, I wish to provide the following views.

Under Article 40, paragraph 2, of the Rules of Court, "the respondent upon receipt of the certified copy of the application, *or as soon as possible thereafter*, shall inform the Court of the name of its agent", referred to in Article 42 of the Statute. This should not take more than a few weeks. Thus, the Application having been filed on 17 May 1989 with the Court and served on the Respondent on 18 May 1989, the Applicant expected the Respondent to appoint its Agent by 1 June 1989 or the Court to write its letter of 5 July 1989, described below, a month earlier. Although it did not file a letter with the Court, by the middle of June 1989 the Applicant made it known that if the Respondent's Agent was not appointed, it would consider to request the Court to proceed with the case under Article 53 of the Statute for non-appearance of the Respondent. Having been advised to wait further, the Applicant forbore until the 5 July 1989 letter of the Court was issued.

The Court by its letter of 5 July 1989 noted the non-compliance of the Respondent in the appointment of its Agent in the case pursuant to Article 40, paragraph 3, of the Rules of Court. In the same letter the Court informed the Parties that the President of the Court intended to ascertain their views with regard to questions of procedure in a meeting with the Agents scheduled for 17 July 1989 and that if there was any difficulty in effecting the appointing of the Respondent's Agent before the meeting, the Respondent's views could be presented by a temporary representative nominated for that purpose.

Pursuant to the Court's letter of 13 July 1989, the meeting was held on 20 July 1989 with Mr. Abraham D. Sofaer, Legal Adviser of the Department of State, and Mr. Michael J. Matheson, Assistant Legal Adviser, as temporary representatives of the United States and the undersigned, the Agent of the Applicant and its delegation. In that meeting the Respondent's representatives raised no question of jurisdiction with the Application nor the possibility of raising it in the form of a preliminary objection. As the Respondent's representatives stated that in two weeks from 20 July 1989 the Agent would be appointed, the President scheduled another meeting for 1 September 1989.

Finally, the Respondent after three months of hesitation by a letter received by the Court and served on the Applicant on 14 August 1989, but dated [illegible] August 1989, appointed its Agent for the purposes of the case without raising any question of jurisdiction. On 15 August 1989, the *New York Times* at page A3, published an article with the title "U.S. Lets World Court Try Iran Air Case" in which it was reported that the United States:

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[1] I, pp. 1-8.

> "Officials said the decision to fight Iran's accusation partly reflected a belief that the United States can persuade the Court that the incident was an accident.
>
> *The Soviet Angle*
>
> But they said the decision also stemmed from a recognition that Washington could not easily refuse to take part when it is working with the Soviet Union to increase the World Court's role in resolving international disputes. 'To have withdrawn would have hurt our credibility with the Russians', a senior official said.
>
> Earlier this month, the United States and the Soviet Union agreed to let the court resolve disputes between them over the interpretation of seven treaties relating to terrorism and drug trafficking. Representatives of the two countries said they would ask Britain, France, and China — the other permanent members of the United Nations Security Council — to join their pact.
>
> The aim is for the big powers to agree to let the World Court settle disputes between them in clearly defined areas of international law and then invite other countries to do the same.
>
> Earlier this year, a committee of private American lawyers that advises the U.S. State Department on international legal matters recommended that the administration contest Iran's case, lawyers said.
>
> But the Defense Department was reported to have opposed fighting the case because it feared that the court might contest America's legal right to protect neutral shipping. Administration officials say they will not accept any part of a judgment that goes 'beyond' the facts of Iran's complaint." (Reprinted in *International Herald Tribune*, 16 August 1989, p. 2, under the title: "U.S. to Fight Charges by Iran in World Court".)

If the letter of appointment of its Agent, filed with the Court after three months of contemplation and examination of the Application, and its public statements carried in the press did not expressly indicate the Respondent's acceptance of the Court's jurisdiction, they at least implied that the Respondent would not contest the Court's jurisdiction in the case.

However on 1 September 1989, the same day scheduled for the meeting of the Agents with the President since 20 July 1989, the Respondent filed a letter with the Court in which it was stated that "It is the present intention of the United States to file preliminary objections in this case prior to the submission by Iran of its Memorial", that "at this time we contemplate filing at least two (jurisdictional) objections", and that:

> "In accordance with Article 79 of the Rules of the Court, when the Registry receives our preliminary objections, we would request that the proceedings on the merits be suspended pending a decision by the Court on those objections following the submission of written pleadings and a hearing in the matter."

The Applicant believes that questions as to the jurisdiction, irrespective of any form which it may subsequently take, have to be raised with the Court in the first available opportunity, in the present case no later than the 20 July 1989 meeting or 14 August 1989 when the letter of appointment of the Respondent's

Agent, dated 9 August 1989, was filed with the Court. Therefore it is the Applicant's position that the Respondent is both estopped and time-barred from raising such jurisdictional questions in the case.

However, even if *arguendo*, the Respondent is still entitled to raise the jurisdictional questions in the form of preliminary objections under Article 79 of the Rules, it should not do so prior to the filing of the Applicant's Memorial. In fact the Respondent's action in not filing its preliminary objections by now and instead informing the Court of its present intention to do so in the future admits of the fact that, if at all, such objections should be filed subsequent to the Applicant's Memorial. If it is believed to have such a right, the Respondent would have already done so. Notable in this regard are the Respondent's statements in its letter of 1 September 1989 such as: "It is the present intention of the United States to file", or "when the Registry receives our preliminary objections, we would request" "at this time we contemplate filing at least two objections". These points have not been changed in the Respondent's letter of 28 September 1989. For the same reasons, moreover, the Court is not in the possession of a preliminary objection so as to be required to determine its admissibility and effect to suspend the proceedings in the case and thus, the Court should not be used for legal advice in a contentious case.

The preliminary objection procedure is an exceptional procedure requiring "great care not to permit it to be abused for the purpose of evading, under cover of technical objections, an undertaking for which good faith commanded respect". S. Rosenne, *The Law and Practice of the International Court*, 451 and n. 2 (2nd revised ed., 1985).

> "The facility of raising issues of a preliminary character at an early stage of the proceedings ... and of having them separately determined in advance of the merits, while these are suspended ... is a considerable concession to the party raising such issues, made on the exclusive basis of the Rules of Court." Jiménez de Aréchaga, "The Amendments to the Rules of Procedure of the International Court of Justice", 67 *Am. J. Int'l L.* 1, 15 (1973).

Contrary to the Respondent's contention, neither the Statute nor the Rules of Court provides a legal basis for the submission and decision by the Court of the intended preliminary objections prior to the Applicant's Memorial in this case. Articles 36 and 53 of the Statute have nothing to do with the filing and decision sequence of preliminary objections. It is therefore wrong to argue, as the Respondent does, that on the basis of these Articles there is an *a fortiori* requirement for the Court to decide preliminary objections prior to the filing of the Memorial. Paragraph 6 of Article 36, which could have been intended by the Respondent, only indicates the general principle of *la compétence de la compétence*, according to which: "In the event of a dispute as to whether the Court has jurisdiction, the matter should be settled by the decision of the Court."

Article 53 of the Statute on default proceedings states:

> "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.
>
> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law."

As the Respondent has finally appeared and so far has defended its case before the Court, the Applicant has not called upon the Court to decide in favour of its claim on the basis of the record before it. It is also clear that the standard of *ex officio* judicial probity in case of non-appearance should be higher than when a Respondent appears and defends its case in a contentious proceeding but does not raise questions of jurisdiction.

The Applicant does not deny that if jurisdictional questions are properly raised by the Respondent, the Court is entitled to decide them, but that such a point in no way indicates that preliminary objections could be filed and if so must be decided prior to the filing of the Applicant's Memorial.

Neither does the Applicant argue that despite a properly raised and filed preliminary objection subsequent to the Memorial, the Respondent should be compelled to discuss the merits of the case. But it is in the extreme to argue that there is a requirement both under the Statute and the Rules that preliminary objections could be filed and if so must be decided prior to the filing of the Memorial. If the authority for preliminary objections, like that for provisional measures, Article 41, had been provided in the Statute it might be argued to override the provisions of Article 43 of the Statute for the submission of the Memorial. Article 79 of the Rules, paragraph 3, providing for suspension of the proceedings on the merits upon receipt of a preliminary objection is not intended to and has not suspended the filing of Memorials and Counter-Memorials in the practice of the Court. But if the Respondent wished to suspend the filing of its own Counter-Memorial, this has been tolerated. Similarly, where an applicant itself raises the preliminary objection its right of filing a Memorial thereafter could be suspended although it only happened once in the *Monetary Gold* case, 1953 *I.C.J.* 44-45.

Shabtai Rosenne in his book on *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice*, 158, 161 (1983) states:

> "As is well known, as is maintained in this paragraph [1 of Article 79 of the Rules], the Court's practice is only to take formal preliminary objections by the respondent after the merits have been laid before it in a pleading, normally the Memorial, and it will be rare that the application alone will be sufficient to elucidate questions of jurisdiction or admissibility. In *Fisheries Jurisdiction* [1972 *I.C.J.* 181] (still under the 1946 Rules) and in *Aegean Sea Continental Shelf* [1976 *I.C.J.* 42-43] (under the 1972 Rules), the Court after objections had been raised formally in provisional measure proceedings, decided that the first pleadings should be directed to the question of jurisdiction, but it did not disturb the normal order of those pleadings — memorial by the Applicant and counter-memorial by the respondent (if it wished to defend its case)."

The Rules have maintained their essential feature in this regard, "namely, that in the normal case in which the respondent State wishes to interrupt proceedings introduced unilaterally by application, it should do so by putting its pleas forward after the memorial has been filed". In fact

> "the Court has never disturbed the normal order for the first round of the written pleadings, even when it has been officially informed at the earliest stage of the respondent's intention to contest the Court's jurisdiction. The most it might do is, in the interlocutory order fixing the time-limits, to describe the respondent State's first pleading as its counter-memorial or preliminary objections." S. Rosenne, *The Law and Practice of the International Court*, 437, 451 (2nd revised edition, 1985).

As Geneviève Guyomar states in her treatise on *Commentaire du Règlement de la Cour Internationale de Justice adopté le 14 avril 1978*, 498, 508 (1983), it does not appear that the Court could consider the Respondent's preliminary objections prior to the filing of the Applicant's Memorial, as the Respondent's objection to the provisional measures, invoking Article 62 of the 1946 Rules on preliminary objections did not stop the Court from ordering for the filing of the Memorial and Counter-Memorial. *Interhandel* case (*Switzerland* v. *USA*), 1957 *I.C.J.* 122-123.

Judge Jimenez de Arechaga himself in a joint dissenting opinion with Judge Bengzon in both *Fisheries Jurisdiction* cases (1972 *I.C.J.* 185 and 192) states:

> "A preliminary objection must be filed within the time-limit assigned for the Counter-Memorial, that is to say, after the presentation of the Memorial, not before it: it is only then that it may have the suspensive effects provided for in Article 62, paragraph 3, of the Rules. Otherwise, a respondent might be able to block the proceedings before the Memorial is filed." *Accord*, H. Thirlway, *Non-appearance before the International Court of Justice* 93 (1985).

Article 62, paragraph 3, of the 1946 Rules has remained unchanged in Article 67 of 1972 and Article 79 of the 1978 Rules.

If the concern is to avoid public discussion of the merits by the Applicant before the Court prior to the establishment of jurisdiction, to the necessary extent it has been accommodated by Articles 38 and 53 of the Rules. Article 38, paragraph 5, of the Rules was revised in 1978 in order not to enter an Application in the General List if the Applicant proposes to find the jurisdiction upon consent to be given or to be manifested by the Respondent after the Registrar has transmitted the Application to the Respondent and unless and until he has received the Respondent's consent to the Court's jurisdiction. The Court's practice under Article 53, paragraph 2, of the Rules also does not allow the pleadings including the Applicant's Memorial to be accessible to the public before the opening of the oral proceedings. Moreover in the case of provisional measures, mainly decided before establishment of jurisdiction, there is no way to avoid public discussion of the merits against the Respondent. In any event, a Respondent who attempts to get credit with other States for publicly accepting the Court's jurisdiction in order to prove that the whole affair was "accidental" while continuing to threat shooting down further civil aircraft and thereby endangering the security of international civil aviation in the Persian Gulf, should not be allowed to hide behind this kind of interpretations.

In fact Judge Jimenez de Arechaga's discussion of the time-limit for filing a preliminary objection (p. 19) does not indicate that Article 79 of the Rules determines the sequence of the filing of the preliminary objection prior to the Memorial. All he does is to mention that there are suggestions either way though he does not identify the sources of these suggestions. At any rate it is questionable why an Applicant should not be able to shape its Memorial in a manner to remove or cure a rectifiable objection, as did the Applicants in the *United States Nationals in Morocco* (1952 *I.C.J. Pleadings* 235) and *Phosphates in Morocco* (1938 *P.C.I.J.*, *Ser. A/B*, *No. 74* at 16) cases.

Another problem in retrospect is that of successive preliminary objections and thereby abuse of the process of the Court and blocking of the Applicant's case. The Respondent in both its letters of 1 and 26 September 1989 clearly reserves its right to contemplate raising additional grounds for preliminary objection as it "has not had an opportunity to determine definitively all of" them. Thus there is no assurance for the Applicant that even when the intended objections filed and dismissed prior to the Memorial, the Respondent would not raise further preliminary objections after its examination of the Memorial. Although in order to avoid paralyzing the course of justice Henri Rolin admitted that the prelimnary objection procedure may only be invoked once (*Nottebohm* case, *I.C.J. Pleadings*, Vol. II, p. 162) and the Respondent in the *Aerial Incident of 27 July 1955, I.C.J. Pleadings*, p. 381, recognized that it could present no further objections, the situation is far from clear in the Court's practice. Therefore the Respondent's suggested sequence of filing and determination of the preliminary objections does not serve the interests of sound administration of justice at all.

As the Respondent has not set forth its contemplated preliminary objections, it is difficult to determine the extent of the necessary arguments of the law and facts. But it is clear that such arguments would be better understood when the Memorial is already filed, relieving the Court from deciding which parts of the Parties' submissions with regard to the preliminary objections are to be maintained or excluded. Moreover, the discussion of law and facts, referred to in Article 79, paragraph 6, of the Rules is limited to jurisdiction, while the Respondent has also contemplated questions of admissibility and otherwise.

Similarly the Applicant is not in a position to comment in detail on whether the assumed preliminary objections if and when filed should be necessarily determined separately from the merits. Article 79, paragraph 7, of the Rules states that the Court shall "either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". Prior to this 1972 amendment, the Court under its practice as well as that of the Permanent Court, incorporated in paragraph 5 of the 1936/1946 Rules, had the option to join to the merits its decision on the objections. It is believed that dropping of the joinder option in the 1972 revision is not to abolish it, thus wiping out a virtually constant jurisprudence itself corresponding to a widely felt need.

Based on Article 48 of the Statute, the Court has an inherent power to join the preliminary objection to the merits as the Permanent Court did before the preliminary objection procedure was included in the Rules in 1936. *Prince von Pless* (*P.C.I.J., Ser. A/B No. 52*). The point that the Court might decide that in the circumstances of the case the objection does not possess an exclusively preliminary character, would add nothing to what the Court already has power to do and which the Permanent Court has done, for instance in *Electricity Company of Sofia* (*P.C.I.J., Ser. A/B No. 77*). The 1972 revision is thus no more than a statement of policy not enjoined by the Statute, jurisprudence and State practice. Indeed as the jurisprudence shows, the joinder power can have many useful applications. Abolishing of the joinder or limiting it to a judgment on the objection would require an explicit provision in the Statute. For example in *Prince von Pless* (*Ser. A/B No. 52*) and *Panevezys-Saldutiskis Railway* (*Ser. A/B No. 75*), the preliminary objections were joined to the merits in the form of orders rather than judgments. Such authority is still available under Article 48 of the Statute. See S. Rosenne, *Procedure in the International Court: A Commentary on the 1978 Rules of the International Court of Justice*, 165-166 (1983).

Judge Jiménez de Aréchaga in his 1973 article, referred to above (pp. 13-15), admits that the joinder power has not been abolished although limiting it to non-jurisdictional preliminary questions. But, as described above, the Applicant believes the joinder power should persist with regard to jurisdiction as at times it would also expedite the proceedings.

In fact in the case of *United States Diplomatic and Consular Staff in Tehran*, despite the Islamic Republic's objections to the jurisdiction, the Court joined its decision on them to the merits by ordering the filing of Memorial and Counter-Memorial. 1979 *I.C.J.* 23-24.

It is also noted that Article 80 of the Rules on Counter-Claims maintains the joinder option regarding questions of jurisdiction and admissibility while there is no reference as to application of Article 79 of the Rules thereto in case of preliminary objections, although its applicability could be argued.

Based on the foregoing, the Islamic Republic of Iran requests the Court to allow the scheduling of the pleadings on the basis of Article 43 of the Statute and Article 44, paragraph 4, and Article 45, paragraph 1, of the Rules of Court.

(*Signed*) Mohammad K. Eshragh.

3. THE AGENT OF THE ISLAMIC REPUBLIC OF IRAN TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

18 Shahrivar 1371
9 September 1992.

I have the honour to refer to the Deputy-Registrar's letter of 16 October 1990 and the Registrar's letters of 30 October 1990, 6 March 1991 and 16 April 1991, together with their enclosures, relating to certain correspondence exchanged with the International Civil Aviation Organization ("ICAO") in connection with the case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America)*. That correspondence indicates that ICAO is contemplating submitting observations in the case and that the Court may fix time-limits, under Article 69, paragraph 3, of the Rules of Court, for such a submission.

For the reasons explained below, the Islamic Republic considers that it would be inappropriate for ICAO to submit any observations in the case. Accordingly, the Islamic Republic respectfully requests the Court not to set any time-limits for the submission of such observations.

The Background Situation

In accordance with Article 34, paragraph 3, of the Statute of the Court, ICAO was notified by the Deputy-Registrar's letter of 22 May 1989 that the construction of the 1944 Chicago Convention on International Civil Aviation, as amended (the "Chicago Convention") and the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the "Montreal Convention") is in question in the case. ICAO also has had communicated to it copies of all the written pleadings submitted in the case to date, and was requested to furnish the Court with certified copies of the Chicago and Montreal Conventions in English and French and a certified list of parties to these Conventions as of 17 May 1989.

The Director of the Legal Bureau of ICAO duly responded with the information requested by letter dated 26 May 1989. Regrettably, however, in the last two paragraphs of this letter, the Director added his personal opinion on certain legal aspects of the dispute that is presently before the Court.

On 30 May 1989, the Deputy-Registrar responded to the Director's letter. Quite correctly, the Deputy-Registrar indicated that while he would in due course be communicating its text to the Parties, he was not consigning it to the case-file "in so far as it relates to matters which fall for the Court itself to consider". In itself, this incident illustrates the problems involved in having ICAO submit observations in this case.

The Islamic Republic was not informed of this correspondence until one and one-half years later when, by letter dated 30 October 1990, the Deputy-Registrar enclosed a copy of a letter he had sent to the Agent of the United States in the case, together with enclosures constituting the correspondence exchanged with ICAO[1].

On the same date, 30 October 1990, the Registrar also addressed a letter to the Secretary General of ICAO drawing his attention, *inter alia*, to the fact under Article 53 of the Rules of Court, the pleadings in the case should be treated as confidential.

By the Registrar's letter dated 14 March 1991, ICAO was invited to indicate whether it wished to submit written observations under Article 69, paragraph 3, of the Rules of Court on this stage of the case. This Article provides, *inter alia*, that:

> "The Court, or the President if the Court is not sitting, may, as from the date on which the Registrar has communicated copies of the written proceedings and after consulting the chief administrative officer of the public international organization concerned, fix a time-limit within which the organization may submit to the Court its observations in writing."

By letter dated 27 March 1991, the Secretary General of ICAO indicated that he believed it "would assist the Court in its deliberations" for ICAO to file written observations. The Secretary General added that in order to prepare such observations, "it will be essential to take into account the observations and submissions of the Islamic Republic of Iran on the preliminary objections filed by the United States of America", and that because the Council of ICAO must be apprised of any proposed written observations and confirm them, the time-limit for such observations should be fixed no less than three months after receipt of the Islamic Republic's Observations and Submissions[2].

In Contentious Cases the Practice Has Been for International Organizations Not to Submit Observations

The Court's jurisprudence indicates that, in contrast to situations where an advisory opinion has been sought, in contentious cases it has been the Court's practice generally not to invite international organizations to submit observations, but where it was, in cases where the decision of an international organization is being brought to the Court on appeal, it has been the practice of such organizations to refrain from submitting observations *proprio motu*.

In the *South West Africa* case, for example, the Director General of the International Labour Office wrote to the Registrar indicating that the International Labour Organisation was at the Court's disposition to furnish any information which the Court might request in connection with the case[3]. In the event, however, the Court did not see fit to request either information or observations.

More to the point, in the *Appeal Relating to the Jurisdiction of the ICAO Council* case (the "*Appeal*" case), the Court, acting under Article 57, paragraph 5, of the Rules of Court then in force, fixed a time-limit for ICAO to submit observations on the convention in issue. By letter dated 6 June 1972, the Secretary General of ICAO stated its intention not to submit any observations in the following terms:

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[1] Although the Islamic Republic was hitherto unaware of this correspondence, apparently the United States knew of its existence because, as the Deputy-Registrar's letter of 30 October 1990 indicates, it was sent to the US Agent in response to a request received from the United States Embassy in The Hague.

[2] *Supra*, pp. 281-613. [*Note by the Registry.*]

[3] *I.C.J. Pleadings, South West Africa*, Vol. XII, pp. 543, 550.

> "In considering the matter, I have noted that the case brought before the International Court of Justice is an appeal against the decision of the Council of the International Civil Aviation Organization, and also that copies of all the relevant proceedings in the Council have already been submitted to the Court. Taking these considerations into account, I have the honour to inform you that the International Civil Aviation Organization does not intend to submit observations on the above-mentioned questions."[1]

This precedent is directly relevant to the present case. As will be seen below, whether or not the matter is deemed to be before the Court on appeal from an action of the ICAO Council is exclusively for the Court to decide. It would be inappropriate for ICAO to comment or take any position on that, or any other issue.

In the first place, it must be noted that it would be wholly inappropriate for ICAO to submit any observations concerning the Montreal Convention. As the Islamic Republic has pointed out in its written Observations and Submissions of today's date, ICAO has virtually no role to play under this Convention and absolutely no authority to interpret or apply its provisions. During the proceedings relating to the destruction of Flight IR 655 before the ICAO Council, the Montreal Convention was not debated and, in fact, the President of the Council in his Statement to the Council dated 9 June 1989 does not appear to have envisaged any role for ICAO to play in terms of submitting observations on the Montreal Convention.

Furthermore, with regard to the possibility of ICAO submitting observations on the Chicago Convention, this would be particularly inappropriate for the reasons alluded to in the *Appeal* case.

The decision of ICAO not to submit its observations in that case points to a principle which is equally applicable here: a forum of first instance should not participate in any manner in an appeal from its original proceedings. This principle is analogous to the *nemo judex* doctrine by which it is universally accepted that no one can be the judge in his own case. By extension, in order to safeguard the impartial nature of the appeal proceedings, no court or quasi-judicial body should contribute on issues on appeal against its own actions. The appealability of ICAO's actions should thus be decided by the Court with no interference from ICAO. In other words, it would not be appropriate for ICAO in essence to certify the appealability of its own actions.

As W. M. Reisman emphasizes in his commentary on the *nemo judex* doctrine, "an arbitrator should not have an interest in the decision", an "interest" being defined in the following terms: "... the outcome and effects of the decision will have a direct impact on a value cherished by the arbitrator, thereby impugning his impartiality".[3] One of the interests suggested by the author is that of "res judicata" or issue preclusion which applies where the arbitrator "has committed himself prior to this appointment to one of the views at issue in the arbitration". Such a situation is analogous to the ICAO Council participating in a case on

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[1] *I.C.J. Pleadings, Appeal Relating to the Jurisdiction of the ICAO Council*, p. 784.

[2] In this regard, the Islamic Republic notes that ICAO has not submitted any observations in connection with the cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, while the Registrar similarly communicated to ICAO a copy of the pleadings of the parties therein: Order of 14 April 1992, para. 14.

[3] See, W. Michael Reisman, *Nullity and Revision — The Review and Enforcement of International Judgments and Awards*, New Haven and London (1971), pp. 475 et seq.

appeal where it has not simply already committed itself to a particular p
but has actually ruled on some of the key points at issue, including whe
United States violated the Chicago Convention[1]. It must be stressed
respect that the decision which the Islamic Republic is appealing was t
the ICAO Council, and that any observations that ICAO may intend to
as suggested by the President of the Council in his Statement of 9 Ja
(Exhibit 51[2]) to the Islamic Republic's Observations and Submissions
made by the Council, not the Assembly. This was confirmed in the lette
Secretary General of ICAO dated 27 March 1991.

The Islamic Republic considers that any ruling made on the issue
Islamic Republic's appeal from the original action of the ICAO Council
made by the Court unfettered by submissions made by the Council.
whether the ICAO Council considers that the Islamic Republic's appeal is
or not is exclusively for the Court to decide (*compétence de la compétence*

As Judge de Castro explained in his separate opinion in the *Appeal* case, th
pretation of a rule laying down an appeal procedure is solely within the juris
of the appeal court once the lower court has made a decision at first instanc

> "When there are rules as to appeal, the court (or arbitrator) canno
> decide whether or not it is possible to appeal its own decision. Inte
> tion of the extent of the rule as to appeal falls within the jurisdiction
> higher court."[3]

Judge de Castro went on to note: "it is the case as a whole which is
ferred to the higher court, with *all the question* it entailed before the co
first instance"[4] (emphasis added).

It is of particular concern that ICAO has indicated that it wishes to see
of the written pleadings in the case before submitting its observations. Th
gests that ICAO may wish to comment on particular positions or argu
advanced by one or the other Party in what approaches being a quasi-
capacity. Given that what is at issue is an appeal from a decision of the
Council, such comments would be highly inappropriate.

As an international organization, ICAO is under an obligation to cond
activities on the basis of strict impartiality and neutrality. To the extent th
ICAO Secretariat would participate in preparing observations, therefore
appropriate to recall the Staff Regulations promulgated by ICAO. Article
these Regulations emphasizes that:

> "Staff members shall conduct themselves at all times in a manner
> ting their status as international civil servants. . . . They shall avoi
> action and in particular any kind of public pronouncement which
> adversely reflect on their status, or on the integrity, independence
> impartiality which are required by that status."

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[1] Reference may also be made in this respect to Article 17 (2) of the Statute o
Court which reflects the similar principle that:

> "No member may participate in the decision of any case in which he has
> ously taken part as agent, counsel, or advocate for one of the parties, or as a me
> of a national or international court, or of a commission of enquiry, or in any
> capacity."

[2] Not reproduced. [*Note by the Registry.*]

[3] *Appeal Relating to the Jurisdiction of the ICAO Council, Judgment, I.C.J. R*
1972, p. 46, at p. 122.

[4] *Ibid.*, p. 125.

Article 1.4 of the Regulations amplifies this point by providing that "Staff members shall exercise the utmost discretion in regard to all matters of official business."[1] This implies that the Secretariat should not become involved in contentious proceedings.

On the other hand, if ICAO, in the light of its status as a neutral public international organization, were nonetheless to limit its observations to strictly historical facts and to avoid gratuitous comments on legal or factual issues advanced by either Party which are for the Court to decide, such observations would be superfluous since all documents, minutes and actions of ICAO relevant to the case have already been filed with the Court by the Parties. In short, the Court has at its disposal the information necessary to decide the issues before it.

The Problem of the Confidentiality of the Pleadings and Documents

There is a further important reason why it would be inappropriate for ICAO to submit any observations in the case. This concerns the confidentiality of the pleadings and documents under Article 53 of the *Rules of Court*, a matter that the Registrar has referred to in his letters to ICAO of 30 October 1989 and 6 March 1991.

As the President of the ICAO Council has noted, to the extent that any observations are prepared, they would be submitted to the Council for comment. In the light of the confidentiality of the pleadings, however, it would obviously be inappropriate for any of the Parties' positions as set forth in their pleadings or documents to be reflected in those comments lest such confidentiality be compromised.

This was essentially the problem encountered by the Secretary-General of the Organization of American States in the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)*. There, the Registrar had drawn the attention of the Secretary-General of the Organization of American States to the case pursuant to Article 34 (3) of the Statute of the Court and had informed him that a time-limit had been fixed by the Court for any observations the Organization might wish to submit.

The Secretary-General of the Organization declined to submit any observations. As the Court noted:

> "By a letter of 29 July 1987, the Secretary-General of the Organization of American States informed the Registrar that in his opinion he would not as Secretary-General have the authority to submit observations on behalf of the Organization, and that the convening of the Permanent Council of the Organization would require each member State to be provided with copies of the pleadings; he recorded his understanding, however, that the Court had notified all parties to the Pact of Bogotá of the fact that the proceedings appeared to raise questions of the construction of that instrument."[2]

For the same reason, the Secretary General of ICAO should decline to submit observations in this case.

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[1] A similar requirement is found in *Regulation 1.5 of the Staff Regulations* of the United Nations. The contentious nature of the case is underscored in connection with cases involving the Chicago Convention by Article 87 of the Rules of Court.

[2] *I.C.J. Reports 1988*, p. 72, para. 7.

To the Extent Observations Are Submitted, It Is Generally in Connection with Requests for Advisory Opinions

It appears that observations have been submitted by public international organizations only where the Court has been asked for an advisory opinion. This was the situation, for example, in connection with the request by the Security Council for an advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*. In contrast, international organizations have not seen fit to submit observations when the Court has been engaged in contentious disputes between two States.

It is also significant that where the ICAO Council has considered the possibility of submitting observations to the Court, this has been in conjunction with the consideration of a matter on its agenda that in no way impinged on proceedings at issue before the Court. Thus, in its consideration of the safety of civil aircraft flying near or over international frontiers at the Thirty-third Session of the ICAO Council, the Secretary General of ICAO drew attention to the proceedings before the Court arising out of the *Aerial Incident of 27 July 1955*[1]. In that case, however, ICAO was not contemplating submitting observations on a matter it had already decided — the Court was being asked to act as a court of first instance and the ICAO Council was not involved in the proceedings in any way. The Council ultimately decided that the Secretariat could supply information to the Court on request without reference to the Council, but that if the Court should ask for an opinion or comments from ICAO, that request and the Secretariat's proposed answer to it should be submitted to the Council. In the event, the question never arose and no observations were furnished because the Court made no such request to ICAO.

Conclusions

In conclusion, there are three reasons why the Islamic Republic considers that the Court should neither receive observations from ICAO, nor fix a time-limit for the filing of such observations. *First*, the Court already has before it a full record of the proceedings before the ICAO Council which, as a contemporary record, provides the best evidence of such proceedings. *Second*, it is inappropriate for the ICAO Council to give any substantive comment on an issue in which it has already rendered a decision and which is under appeal. *Third*, the preparation of any observations would inevitably risk a breach of confidentiality contrary to Article 53 of the Rules of Court.

The 1946 Rules, in Article 57, paragraph 5, provided that after a notification had been made, the Court or its President "shall . . . fix a time-limit" for the public international organization in question to submit its observations. This Article has now become Article 69, paragraph 3, of the Rules of Court, and the word "shall" in paragraph 3 has been replaced by the word "may". As the former President of the Court, Eduardo Jiménez de Aréchaga, has explained :

> "This makes it clear that under the Statute the Court is empowered but not obliged to fix a time-limit for the presentation of observations by the public international organization in question, even if the interpretation of its constituent instrument is in question in a case before the Court."[2]

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[1] ICAO doc. C-WP/2609, 21 February 1958, para. 5.

[2] *American Journal of International Law*, Vol. 67 (1973), p. 1, at p. 8.

The Islamic Republic requests that, in the light of the above, the Court decline to fix a time-limit for the submission of observations by the ICAO Council. Such observations would be superfluous, inequitable, contrary to the Rules of Court and contrary to the aims of the compromissory clauses under the Court's consideration. If, contrary to the Islamic Republic's submission, observations are forthcoming, they should not, in any event, be considered by the Court.

4. THE AGENTS OF THE ISLAMIC REPUBLIC OF IRAN AND THE UNITED STATES OF AMERICA TO THE REGISTRAR

8 August 1994.

We have the honour to refer to the case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America)*.

The parties in this case have entered into negotiations that may lead to a full and final settlement of this case. Taking into consideration these negotiations, the parties request that the Court issue an order under Article 48 of the Statute of the Court and Article 54 of the Rules of Court postponing *sinie die* the opening of the oral proceedings in this case, currently scheduled to commence on September 12, 1994. If the negotiations do not result in a full and final settlement, either party, without the consent of the other party, may request the Court to fix a date for the opening of oral proceedings.

(Signed) Conrad K. HARPER. *(Signed)* Mohammad K. ESHRAGH.

5. THE DEPUTY-REGISTRAR TO THE AGENT OF THE UNITED STATES OF AMERICA

10 August 1994.

I have the honour to acknowledge receipt of a joint letter, dated 8 August 1994 and received in the Registry on 10 August 1994, from the Agents of the Parties in the case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America)*, by which the Court is informed:

(a) that the Parties "have entered into negotiations that may lead to a full and final settlement of this case";

(b) that "taking into consideration these negotiations, the parties request that the Court issue an order under Article 48 of the Statute of the Court and Article 54 of the Rules of Court postponing *sine die* the opening of the oral proceedings in this case, currently scheduled to commence on September 12, 1994"; and

(c) that "if the negotiations do not result in a full and final settlement, either party, without the consent of the other party, may request the Court to fix a date for the opening of oral proceedings".

Copies of this letter have been communicated to the Members of the Court.

On the instructions of the President of the Court, I further have the honour to inform you that, due note having been taken of the agreement between the Parties as described above, the President has decided, pursuant to Article 54 of the Rules of Court, that the date of the opening of the oral proceedings is to be postponed *sine die*. As in the case of the decision whereby the Court previously fixed the date for the opening of the oral proceedings, as agreed by the Parties during a meeting with the President held on 1 March 1994, no Order is needed for the purpose of the postponement now requested.

I am writing in the same terms to the Agent of the Islamic Republic of Iran.

(Signed) Jean-Jacques ARNALDEZ.

6. THE AGENTS OF THE ISLAMIC REPUBLIC OF IRAN AND THE UNITED STATES OF AMERICA

22 February 1996.

We have the honour to refer to the case concerning the *Aerial Incident of 3 July 1988 (Islamic Republic of Iran* v. *United States of America)*.

The parties in this case have entered into an agreement in full and final settlement of this case. This agreement, reflected in the attached documents[1], is hereby submitted to the Court. Taking into consideration this agreement, the parties request that the Court issue an order under Article 48 of the Statute of the Court and Article 88 of the Rules of the Court recording the discontinuance of this case, directing that the case be removed from the Court's list, and indicating that the parties have entered into an agreement in full and final settlement of all disputes, differences, claims, counterclaims and matters directly or indirectly raised by or capable of arising out of, or directly or indirectly related to or connected with, this case.

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[1] See pp. 649-651, *infra*.

SETTLEMENT AGREEMENT

ARRANGEMENT AMIABLE

SETTLEMENT AGREEMENT ON THE CASE CONCERNING THE AERIAL INCIDENT OF 3 JULY 1988 BEFORE THE INTERNATIONAL COURT OF JUSTICE

The Government of the United States of America ("United States") and the Government of the Islamic Republic of Iran ("Iran"),

Having considered the settlement of the Case Concerning the Aerial Incident of 3 July 1988 currently pending before the International Court of Justice ("Court"), and noting that the United States recognized the aerial incident of 3 July 1988 as a terrible human tragedy and expressed deep regret over the loss of lives caused by the incident,

Agree as follows:

1. In full and final settlement of all disputes, differences, claims, counterclaims and matters directly or indirectly raised by or capable of arising between them out of or related to the Case Concerning the Aerial Incident of 3 July 1988 currently pending before the Court ("I.C.J. Case"), and directly or indirectly raised by or capable of arising out of or related to certain cases pending before the Iran-U.S. Claims Tribunal designated as "Tribunal Cases" in the Settlement Agreement on Certain Claims Before the Iran-U.S. Claims Tribunal, the United States shall pay the Settlement Amount of US $131,800,000 (One Hundred Thirty One Million and Eight Hundred Thousand U.S. Dollars) as provided in the General Agreement on the Settlement of Certain I.C.J. and Tribunal Cases, which shall include US 61,800,000 (Sixty One Million and Eight Hundred Thousand U.S. Dollars) for the heirs and legatees of the 248 Iranian victims of he aerial incident listed in Annex 1 ("Heirs"). Compensation to he Heirs shall be distributed in accordance with the terms and onditions set forth in Annex 2.

. Upon payment of the Settlement Amount and issuance of the rder of Discontinuance by the Court, Iran and its affiliates, ubsidiaries, agents, agencies, instrumentalities, predecessors, successors and assigns shall release, quitclaim and forever discharge the United States and its affiliates, subsidiaries, agents, agencies, instrumentalities, predecessors, successors and assigns from and against any and all claims with respect to, arising out of, in connection with or related to the I.C.J. Case.

3. Upon payment of the Settlement Amount and issuance of the Order of Discontinuance by the Court, Iran shall indemnify and hold harmless the United States and its affiliates, subsidiaries, agents, agencies, instrumentalities, predecessors, successors and assigns against any claim, counterclaim, action or proceeding that Iran, its affiliates, subsidiaries, agents, agencies, instrumentalities, predecessors, successors and assigns may raise, assert, initiate or take against the United States with respect to, arising out of, in connection with or related to the I.C.J. Case.

4. Upon payment of the Settlement Amount and issuance of the Order of Discontinuance by the Court, Iran and the United States shall waive any and all claims for costs, including attorneys' fees, arising out of or related in any way to the prosecution or defence of any claim before any forum, including the Court, with respect to, arising out of, in connection with or relating to the I.C.J. Case.

5. This Settlement Agreement shall not in any manner prejudice the rights of the insured, their successors and assigns to pursue their claims against any insurance company.

6. This Settlement Agreement has been entered into for the sole purpose of settling the disputes at issue in the I.C.J. Case. This Settlement Agreement shall not constitute a legal precedent and shall not be used except for the purpose of giving effect to its terms.

7. The releases, indemnifications and waivers contained in this Settlement Agreement are self-executing upon the issuance by the

Court of an order discontinuing the I.C.J. Case and recording the terms of this Settlement Agreement.

8. For the purpose of construction or interpretation of this Settlement Agreement, the entire Agreement shall be read and construed as a whole without giving any specific effect to any paragraph separately.

9. The representatives of the United States and Iran hereby expressly declare that they are duly empowered to enter into and execute this Agreement.

10. This Settlement Agreement has been written and signed in both the English and Persian languages and each text shall have the same and equal validity.

11. This Agreement shall take effect upon signature by both Parties.

For the United StatesFor the Islamic Republic of Iran
By:________________By:________________
Date: Feb. 9, 1996 Date: 9.2.96

[Annexes not reproduced]

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